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BI-ANNUAL REPORT FOR FISCAL YEAR 2006

TABLE OF CONTENTS

I. Letter from the Executive Director and the Chairperson	... 1
II. Purpose and Mission Statement	... 2
III. List of Board Members	... 3 – 7
IV. List of Staff	... 7 – 8
V. Data Analysis	... 9 – 10
VI. Trends	... 10 – 11
VII. Community Outreach	... 11
VIII. Lawsuit Information	... 11 – 82
a. Plaintiffs' Memorandum in Support of Declaratory Judgment	... 13
b. Defendants' Memorandum of Law in Opposition to Plaintiff's Declaratory Judgment Action	... 35
c. Declaratory Judgment	... 57
d. Order Regarding Plaintiffs' Complaint for Declaratory Relief	... 59
e. Motion for Order Staying PERA Proceedings Pending Appeal	... 68
f. Order Denying Motion for Stay on Appeal	... 81
IX. NACOLE Conference Agenda	... 83 – 84
X. NACOLE Conference Report	... 85 – 99

Kevin E. Deary
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David N. Cicilline
Mayor

PROVIDENCE EXTERNAL REVIEW AUTHORITY

City of Providence, RI

Officers

Chair
Paul Caswell

Vice Chair
Luz Bravo-Gleicher

Treasurer
Philip McKendall

Secretary
Kohei Ishihara

Board Members

Stanley A. Bleecker

Kenneth Brown

Artin Coloian

Michael Correia

Mary Kay Harris

John Hearn

Dr. Arthur Jones

Mary Jones

Rochelle Lee

David Marshall

Frederick J. Price

Myrth York

December 14, 2006

Honorable Mayor and Members of the City Council
25 Dorrance Street
Providence RI 02903

Dear Mayor Cicilline and Members of the City Council,

Enclosed is the Providence External Review Authority's (PERA) 2006 Yearly report submitted for your review. This report focuses on the statistical analysis of complaint data and the last years' events PERA has been involved in with the courts.

PERA is in the process of conducting a survey with the Providence Police Department regarding the effectiveness of the Law Enforcement Officers Bill of Rights, R.I. General laws Section 42-28.6.

I would like to acknowledge Mayor Cicilline and the City Council for your continued support for the office of the Providence External Review Authority and the civilian oversight process. I want to also thank the members of the City's Law Department who have responded to our questions and needs under the leadership of Joseph Fernandez. I want to thank the members of my staff at PERA and their contributions to the civilian oversight process this past year. I want to acknowledge the efforts of the PERA Board for their tireless efforts in support of the civilian oversight process. I would also like to recognize the efforts of the Providence Police Department, particularly Inspector Francisco Colon and the Internal Investigations and Inspection Division, for providing PERA with the necessary information to proceed with our investigations and for their ongoing cooperation.

Respectfully submitted,

Kevin E. Deary
Acting Executive Director

Paul Caswell
Chairperson

Phone (401) 228-6989
Fax (401) 228-6998



David N. Cicilline
Mayor

PROVIDENCE EXTERNAL REVIEW AUTHORITY
City of Providence, Rhode Island
550 Broad Street
Providence, RI 02907

“The Purpose and the Mission of PERA”

The purpose of the Providence External Review Authority (PERA) is to investigate allegations of misconduct on the part of officers of the Providence Police Department, to make findings of fact and to make recommendations of potential disciplinary action to the Chief of Police.

PERA was established in 2002 by Providence City Ordinance No. 614 (Chapter 2002-39), to provide for a system of Civilian Oversight over the Providence Police Department. PERA has the mission and the authority to investigate and conduct hearings concerning allegations of misconduct on the part of sworn officers of the Providence Police Department.

If you believe that you have been the victim of misconduct committed by a sworn officer of the Providence Police Department, you have the right to report the incident to PERA*. You may contact PERA at the address and telephone number provided above or you can email (PERA) at

Pera@providenceri.com

Board Members

Officers

Chair

Paul Caswell

Mr. Caswell was appointed by City Council President John J. Lombardi to a 3-year term in March 2004 and appointed Chair in March 2005.

Vice Chair

Luz Bravo-Gleicher

Former Councilman David Segal appointed Ms. Bravo-Gleicher to a 3-year term in March 2006.

Treasurer

Philip McKendall

Councilperson Peter S. Mancini appointed Mr. McKendall to a 3-year term in June 2005.

Secretary

Kohei D. Ishihara

Councilperson Miguel Luna appointed Mr. Ishihara to a 3-year term in April 2005.

Board Members

Stanley A Bleecker

Mr. Bleecker was appointed by City councilperson Rita M. Williams to a 3-year term in April 2006.

He was born in Providence, Rhode Island. He has a son and daughter and three grandchildren. His primary and secondary education was within the Providence school system including graduation from Classical High School. He is a graduate of Brown University with a Bachelor of Science in Electrical Engineering and obtained a law degree from Boston University. Upon graduation from college he worked for three years at the Westinghouse Electric Company, a company that no longer exists. Upon graduation from law school he went to work for the Providence Law Firm of Tillinghast, Collins and Graham for twenty-seven years. For most of those years he was a partner. He currently is a solo practitioner with an office in the city of Providence. Over the years he has held a number of positions in community and charitable organizations including President of the Board of Directors of Alias Stage, board member of Brown University, Rhode Island School of Design, Hillel, Board Member and Vice President of Rhode Island Community Mediation Center. He finds that working for PERA as a Board Member to be extremely worthwhile.

Kenneth Brown

Councilperson Kevin Jackson re-appointed Mr. Brown to a 3-year term in June 2006.

Mary Kay Harris

Council President Pro Tempore Balbina Young re-appointed Ms. Harris to a 3-year term in March 2006.

A board member since 2003, Ms. Harris is the community organizer for police accountability at Direct Action for Rights and Equality (DARE). She joined DARE in 1998 and immediately began working with the DARE police committee to help win public access to hundreds of civilian complaint records that the City refused to give out. Since joining the DARE staff in 1999, Ms. Harris has worked within a large coalition to win passage of the nation's 7th Driving While Black Bill and has organized victims of police brutality to fight for systematic change within the Providence Police Department. Ms. Harris training in outreach, leadership development, and strategic development have help win the passage of a city ordinance for the creation of PERA (Providence External Review Authority) that is functioning as an autonomous body to investigate allegations of police misconduct. Harris serves on the PERA Board because she believes it assists in creating both the perception and the reality of a safer community in the City she loves.

John David Hearn

Councilperson Patrick Butler appointed Mr. Hearn to a 3-year term in January 2005.

John Hearn is currently a Providence resident. His parents are Irish immigrants who moved to Providence in 1946. His wife's grand parents are Italian immigrants who moved to Providence in the 1920's. He married his high school sweetheart, and they have two children, Amanda and Elliot. Mr. Hearn attended grade school at St. Raymond's. From there he attended Our Lady of Providence, and graduated from Hope High School in Providence. It was nine years ago that he had an opportunity to take a job in management for a large tile manufacture, Daltile, and he did. Today he handles commercial sales for greater Boston, Southeastern MA and RI. He is on the board of governors at Triggs Golf Club in Providence, and he is on a fund raising committee for Save Sight Rhode Island. As far as his outlook on the future of PERA, he is confident.

Kohei D. Ishihara

Councilperson Miguel Luna appointed Mr. Ishihara to a 3-year term in April 2005.

Kohei D. Ishihara grew up in Rockville, Maryland where he first started analyzing race and oppression through his peer leadership work at St. Andrews Episcopal High School. Kohei moved to Providence, Rhode Island in the fall of 1998 to attend Brown University. Kohei then made the important decision to stay in Providence, RI and work to develop and empower the Southeast Asian community. Kohei is the co-founder and Executive Director of the Providence Youth Student Movement (PrYSM), a grassroots Southeast Asian youth organization committed to anti-racist organizing, youth empowerment, and community development (visit www.prysm.us). He is a founding PERA board member who joined PERA because he wanted to find a way to honor the community struggle for police accountability that started years before the death of Sgt. Cornell Young, Jr. "This country and nation is responding to terrorism by taking

away the rights of ordinary citizens, by denigrating the lives of poor and struggling immigrants, and by building a police state where violence is institutionally enforced to preserve the American status quo." He feels that he is on PERA to enforce justice against police officers who have abused their power, or have used any size, shape, or form of illegal profiling. He sees PERA as strengthening the relationship between the community and the police, and preserving the respect and sanctity of both. In the future, he envisions the Providence Police Department and PERA working harmoniously to create alternative forms of policing, and working to build stronger, healthier, and safer communities.

Dr. Arthur Jones

His Honor Mayor David N. Cicilline appointed Dr. Jones to a 3-year term in May 2004.

Dr. Arthur C. Jones is an Assistant Professor of Legal Studies at Johnson & Wales University, Providence RI where he has been on faculty since 2001. His teaching and research have been in law enforcement, corrections and parole. Dr. Jones received his Ph.D. from The Union Institute Cincinnati Ohio (1999) and has served as a social worker and administrator in corrections for 32 years. He retired from the New Jersey Department of Corrections and Parole after 28 years of service. During his career in New Jersey he served 12 years on the New Jersey State Parole Board. Six (6) years on the Juvenile Panel and six (6) years on the Adult Panel. Dr. Jones also served eight years on the Police Training Commission (PTC). He worked as an Adjunct Professor at Rutgers University, Seton Hall University and several community colleges. Shortly after retiring in 2001, he moved to Rhode Island. He is currently a member of Rhode Island State Parole. Governor Almond appointed him to the Rhode Island Parole Board in June 2002. The Mayor David Cicilline appointed him to the Providence Police External Review Authority (PERA). Dr. Jones is a criminal justice consultant, trainer, educator and practitioner. He is a recognized proponent of the community-based approach to managing the needs of the criminal justice system. He is interested in working with criminal justice planners and law enforcement agencies to improve, police and community relations. He has been active in many professional organizations over the last 32 years. He is a member of numerous criminal justice professional organizations, the Academy of Criminal Justice Sciences (ACJS), Northeastern Association of Criminal Justice Sciences (NEACJS), American Correctional Association (ACA), Association of Paroling Authorities International (APAI) American Probation and Parole Association (APPI) The American Society of Criminologist and is President of the Rhode Island Association of Criminal Justice Sciences (RIACJS).

Rochelle Lee

Communications from Thomas P. Whitten, Chairman, Providence Human Relations Commission, dated August 17, 2006, Informing the City Clerk that he is this day appointing Rochelle Lee to the Providence External Review Authority (PERA), for a three (3) year term.

Ms. Lee has been a lifelong resident of Rhode Island and has been very active in community affairs in South Providence. Ms. Lee is an urban planner with specialized expertise in residential development financing and management. She has worked with non-profit and community-based sponsors to develop more than \$20 million of affordable housing in Rhode Island and Massachusetts. For several years, Ms. Lee managed the Local Initiatives Support Corporation (LISC) program to improve capacity of community development corporations engaged in revitalizing urban neighborhoods. She was Asset Management Specialist for the National Equity

Fund's \$100 million investment portfolio throughout New England, managing related equity investments in residential property. She is a board member of several community-based organizations including the Mt. Hope Neighborhood Land Trust, the Elmwood Community Center, Good News Housing, and MUSIC ONE. Ms. Lee is the current board president of the RI chapter of the Association of Fundraising Professionals. She is a Wellesley College alumna and holds a B.A. degree from the University of Massachusetts, (magna cum laude), a Masters of Art from Boston University and a Masters of City Planning from the School of Architecture at the Massachusetts Institute of Technology. She was a recipient of a HUD Fellowship to attend MIT and through her Master's Degree program at Boston University; she studied at the University of West Indies completing graduate teaching practicum-training teachers in Kingston, Jamaica.

David D. Marshall

Councilperson John J. Igliozi appointed Mr. Marshall to a 3-year term in July 2005.

Mr. Marshall is 47 years of age, married with (2) children- Bryan (18) and Jennifer (23). He is employed for 31 years with the Providence College Security Department as a Sergeant on the 11pm-7am shifts. He commands approximately 22 officers. He attended LaSalle Academy, graduating in 1975, went to Roger Williams College and CCRI and is now attending Providence College SCE. He is very active in the neighborhood and well respected by many. He entered the political arena with an unsuccessful bid for the 2002 City Council. He is interested in PERA because he believe that public voices should have a chance for fair actions and it should be known that everyone should be at least heard with interest and understanding. A fair judgment should be always made for BOTH PARTIES in all cases.

Mary Jones

Communications from Councilman Terrence Hassett, dated July 27, 2006, informing the City Clerk that he is this day appointing Ms. Mary Jones to the Providence External Review Authority (PERA), for a three (3) year term to expire in July 2009.

Ms. Jones is a lifelong resident of Rhode Island and has been active in community affairs for many years.

Myrth York

Communication from Councilwoman Carol A. Romano, dated July 19, 2006, informing the City Clerk that she is this day re-appointing Myrth York to the Providence External Review Authority. Former Providence Human Rights Commission Director Christine Roundtree appointed Ms. York to a 3-year term in May 2003 that expired. (Ms. York was appointed by Councilwoman Carol Romano to conclude the appointment of Sylvia Pulliman who resigned which expires July 2008)

Myrth York is an officer and director of York Resources, Inc., a financial investment company owned by her family. She lives in Providence with her husband, David B. Green and their two children, Nyssa, age 21, and Caleb, age 14. She and her husband are also foster parents to Neath Pal, who is grown and lives in Rhode Island. She earned her Bachelor's Degree from the University of Denver, and is a graduate of Boston University School of Law, from which she received both a J.D. and a Master of Laws in taxation.

She was chosen as a Fellow at the Institute of Politics, John F. Kennedy School of Government, Harvard University. She served in that capacity for the spring semester, 1999. More recently she taught a course on The Elections of 2000 at the University of Rhode Island and was a panelist on radio station WPRO's Political Girl Talk hosted by Myrna Lamb. She was the Democratic candidate for governor of Rhode Island in 1994 and 1998. In 1994 she was the first woman Democratic candidate for governor and the first person to defeat an incumbent Governor in a Primary.

Frederick J. Price

Communication from Councilwoman Josephine DiRuzzo, dated November 10, 2006, Informing the City Clerk that she is this day appointing Mr. Frederick James Price as a member of the Providence External Review Authority (PERA). (Mr. Price will replace Oscar Vargas, who has been removed from the committee, for the remainder of the term).

Mr. Price is a retired prison guard having been employed at the Adult Correctional Institution. He is a life long Rhode Island resident.

Artin D. Coloian

Communication from Council President John Lombardi dated October 24, 2006, informing the City Clerk that he is this day appointing Mr. Artin Coloian as a member of the Providence External Review Authority (PERA) to serve the remaining term of the Reverend James Cook that expires in March 2008. Mr. Coloian is an attorney and businessman in Providence, RI.

Michael Correia

Communication from Councilman Joseph DeLuca, dated November 20, 2006, Informing the City Clerk that he is this day appointing Mr. Michael Correia as a member of the Providence External Review Authority (PERA). (Mr. Correia will be replacing Eva Ann Geoppo)

Mr. Correia was born in Providence, RI. He resides in the Mount Pleasant section of Providence. He have a 14 yr. old daughter her name is Jona. His primary and secondary education was within the Providence School system. He is very active in his neighborhood and well respected by his neighbors. Over the years he has held a number of positions in community organizations. He is currently President of the Providence Crime Watch, which serves the resident of Mount Pleasant, Fruit Hill, and Manton area of Providence. Providence Crime Watch's mission is to serve the residents of Mount Pleasant, Fruit Hill and Manton through crime prevention programs and activities. When asked to serve as a member of PERA, he was honored. He see PERA as a way of strengthening the relationship between the community and police, and preserving the respect and dignity of both.

STAFF

EXECUTIVE DIRECTOR

Leon Drezek was appointed Executive Director in January, 2005, and resigned in March, 2006, to accept a federal position with the Department of Homeland security in Washington D.C.

Mr. Kevin E. Deary

He was appointed Acting Executive Director by the PERA Board of Directors on March 27, 2006. Mr. Deary is a retired FBI Agent with 25 years of service to the United States. He has served in numerous communities across America to include Minneapolis, New Mexico, Miami and Rhode Island. He has conducted numerous federal civil rights violation cases over the years. Mr. Deary has worked in the insurance industry investigating fraud, the tobacco litigation field and the private investigations field to include sensitive government background investigations since his federal retirement in 1994. Due to his 12 years of residency in Rhode Island he is familiar with the ethnic makeup of the various communities. Mr. Deary in his short time has brought PERA through the lawsuit by the FOP, developed solid working relationships with the Attorney General's Office, the Command Staff of the Providence Police Department, especially the Internal Investigations and Inspection Division, and the Rhode Island Chiefs of Police Association, the Roundtable of the Urban League, as well as community organizations throughout Providence. Mr. Deary is developing a Manual of Operations for PERA so its important work can continue on in an organized manner. Mr. Deary has supervised the staff at PERA so that the daily operations move smoothly. He has met with the Mayor and his staff, City Council members, numerous department heads and employees in order that PERA attain its goals within the city. He has assisted in training PERA Board Members as to their expected duties. He continues to meet with community support members and develop new advocates throughout the Rhode Island network.

Mr. Roderick J. Kennedy

He was appointed as the Investigator under Mr. Deary in May 2006. He brings 25 years of experience with the FBI to PERA. Mr. Kennedy investigated numerous federal civil rights cases in Rhode Island and Massachusetts during his career. Mr. Kennedy is a native of Rhode Island having been raised in Providence and attended Providence public schools and Providence College. He was a US Army helicopter pilot attaining the rank of Captain. Since his retirement from the FBI he has been involved in numerous investigations in Massachusetts and Rhode Island. His father still resides in Rhode Island. In addition Mr. Kennedy brings a strong knowledge of computers and data collection systems to PERA. He has been heavily involved with the IT department of the city in upgrading PERA's IT network. Mr. Kennedy is also involved in the development of a Manual of Operations for PERA so that PERA's investigative staff will have guidelines to follow.

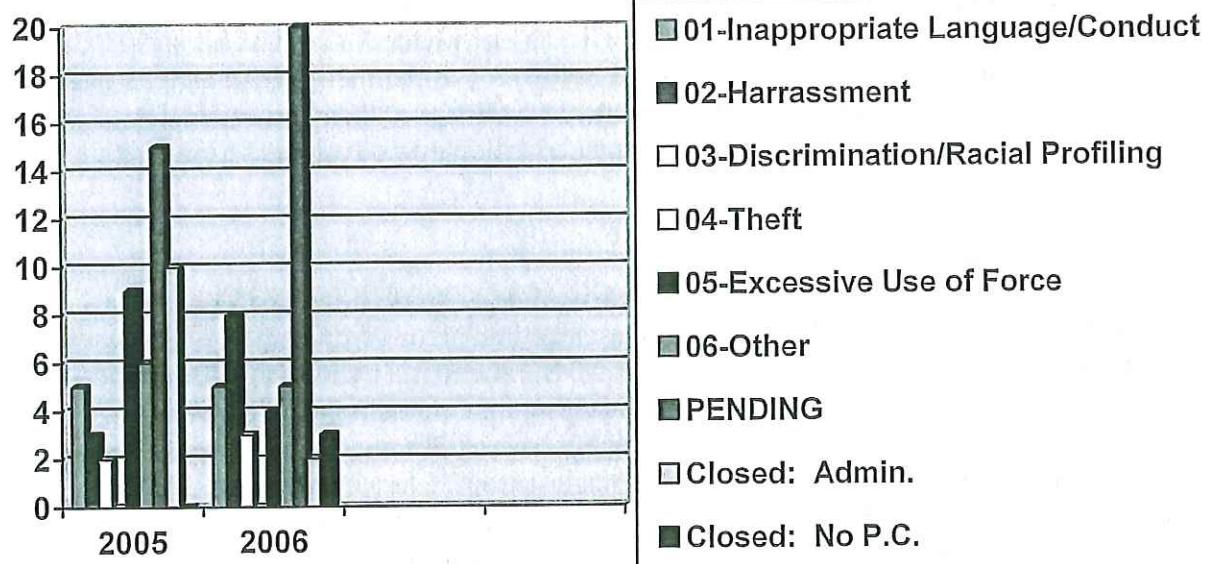
Ms. Kathy Gee

She was appointed in December 2004, as the Confidential Secretary of PERA. She reports directly to the Executive Director, which investigates allegations of police misconduct in the City of Providence. Ms. Gee assist the Executive Director and his investigators in handling all duties of the PERA office as they pertain to emergency and non-emergency situations and complaints. She is not only the Confidential Secretary but also the PERA point of contact for the community. She is a licensed Notary Public, instrumental in developing the PERA website, has produced PERA informational pamphlets and brochures, and runs the overall daily operations of the office with the daily dealings with departments at City Hall. She is also responsible for performance of complex and difficult, duties concerning highly confidential law enforcement matters. She along with Mr. Kennedy has been developing a data system for PERA and a Manual of Operations guideline. Ms. Gee in her short tenure has developed close working relationships with strategic members of departments at City Hall, which offer expertise to PERA. Ms. Gee accepted the position at PERA because she believes in the mission and purpose of PERA, and is willing to offer her support as well as her skills to make this a functioning and productive organization.

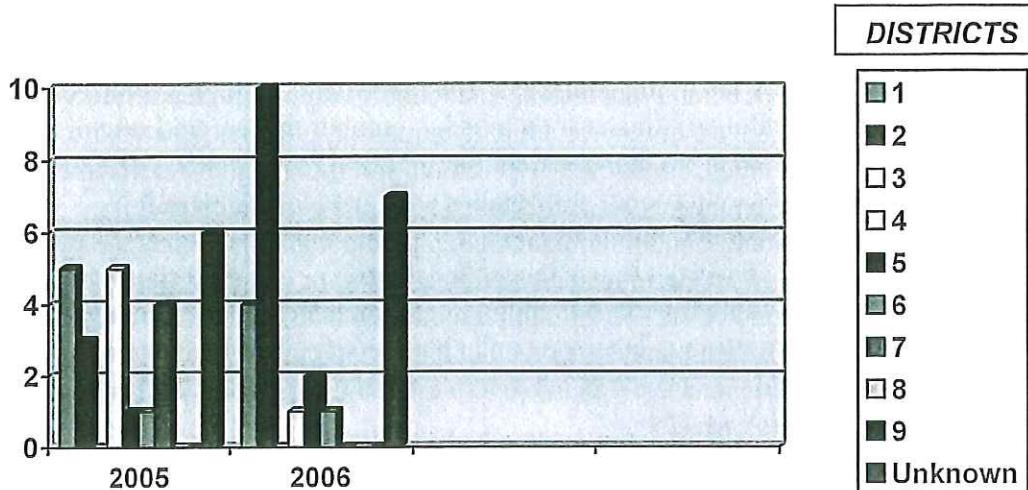
DATA ANALYSIS

PERA has opened twenty-five cases during the calendar year 2005 and have fifteen pending cases. These cases have been tolled during the period of time when PERA was involved in the lawsuit with the FOP as well as the legal discussions up to the actual declaratory judgment on November 15, 2006.

PERA has also received twenty-five cases during the calendar year 2006 up to November 21, 2006. The charts indicate the type of complaints received, the numbers of violations and the Providence Police Districts where the incidents occurred.



	2005	2006
Cases Open	25	25
Category 1 – Inappropriate Language/Conduct	5	5
Category 2 – Harassment	3	8
Category 3 – Discrimination/Racial Profiling	2	3
Category 4 - Theft	0	0
Category 5	9	4
Category 6	6	5
Pending	15	20
Closed: Admin	10	2
Closed: No P.C.	0	3



TRENDS

The initial trend obvious to PERA staff is the delay in receiving responses from the Providence Police Department (PPD) for requests for PPD reports, officer information, and other necessary information for PERA to accomplish its mission and goals.

Initially, meetings were held with the Colonel of the PPD and the Major overseeing the Internal Investigations and Inspections Unit. It was their decision that all requests from PERA go through the IA Inspector. Due to the lengthy policy and procedures development process the responses from the PPD have been slow. However, knowing the PERA ordinance and Administrative Rules the PPD is aware of time constraints on PERA's investigations. Historically this was always one of the major complaints of the Providence community as a whole, the untimely reporting of police misconduct cases.

Again, it has been widely known the Providence Lodge #3 of the Fraternal Order of Police (FOP) intended on suing PERA when PERA brought a case forward. This being done and adjudicated the process should be moving forward vigorously. The cases before PERA are in various stages mostly due to lapses in information from the PPD. PERA is certainly aware the PPD has its own ongoing important investigations and problems with manpower but this cannot be construed as an excuse for slow response to PERA's requests for information. The process must include PERA in a timely and efficient manner. These concerns are being addressed by the Inspector as well as other members of the Command Staff to develop a better operations procedure.

The second trend observed by PERA is that PERA has received several complaints of misconduct against Providence Police officers where it reveals some deficiencies in the abilities of officers to recognize and conduct themselves appropriately with persons who suffer from a mental illness. The complaints seen thus far at PERA appear to raise two concerns:

- (1) Officers who raise the bar of an encounter into an altercation that leads to the use of force or an arrest either because they don't recognize the person has an illness or the officer lacks the training skills to quell the situation without a confrontation or arrest;
- (2) officers recognize or suspect that a person may have a mental illness issue but do not care to assist the individual.

Thirdly, PERA has observed through its complaint process the public does not know the officers name or badge number when they are being contacted. The identification of police officers by the public still lacks uniformity. Police officers wear a badge number that coincides with their federal ID number. This number changes, however, with promotion in rank above detective. A program used in other parts of the country has officers carry business cards identifying themselves by name, badge number and points of contact, i.e. phone numbers, districts etc. These cards are given out to the public in every circumstance, ticket, arrest, or simple contact so the public knows whom they are in contact with. It is highly recommended that the Providence PD adopt the policy of issuing police officers business cards that identify them by name and badge number, district and contact numbers and are given to every citizen the officer comes in contact with either by traffic stop, searches or arrests.

COMMUNITY OUTREACH

PERA continues to expand its efforts in its community outreach program within the City of Providence. Through the assistance of the PERA Board members the staff has attended numerous community events such as the Khmer New Year celebration, the 25th Anniversary celebration for D.A.R.E., and numerous festivals throughout the summer months.

The Acting Executive Director has been welcomed to sit on the Rhode Island Civil Rights Roundtable of the Urban League meetings held monthly at the Urban league offices. The Acting Executive Director has also been welcomed to the Rhode Island Police Chiefs Association Roundtable and has been placed as a member of the Minority Advisory Board with Peter Wells of the Providence American newspaper, Joe Fowlkes of the Urban League, Colonel Dean Esserman of the Providence Police Department, Rusty Serpa of the Bristol RI Police Department and Bob Wall of the RI State Police.

Through these community efforts PERA is able to reach organizations such as RI National Organization of Women, RI Commission for Human Rights, RI Commission of Justice, RI Attorney General's Office, the Urban League, the Jewish Federation, RI Alliance for Gay and Lesbian Civil Rights, Progresso Latino, and others.

Outreach has goals for the future to reach the City of Providence school-age children to help better educate our youth as to their rights in contact with police officers.

Lawsuit

On September 15, 2006 an action was brought by Providence Lodge No. 3, Fraternal Order of Police (FOP) and two Providence police officers to challenge the validity of Providence Code of Ordinances § 18½ -2, the ordinance that establishes the Providence External Review Authority (PERA), (C.A. No. PC 06-4859). The City of Providence and David N. Cicilline, in his capacity as Mayor of the City of Providence, were also defendants.

On October 3, 2006 Plaintiffs memorandum in support of the declaratory judgment was filed with Superior Court.

On October 18, 2006, defendants filed a memorandum of law in opposition to the plaintiff's declaratory judgment action.

On November 3, 2006 a hearing was held before Superior Court Justice Stephen J. Fortunato Jr. where the plaintiff's complaint was denied.

On November 15, 2006 the court denied the Plaintiff's Complaint to invalidate in its entirety Section 18 ½ -2 of the Providence Code of Ordinances; as provided PERA may conduct investigations and hearings of alleged misconduct and if sustained may make recommendations deemed appropriate and consistent with the disciplinary matrix to the Chief of Police. The Ordinance is not to be construed or interpreted as authorizing PERA to impose discipline directly on any law enforcement officer nor to require the Chief of Police of the City of Providence to impose discipline without affording the officer the full protections of the Law Enforcement Officers' Bill of Rights Act, R.I. Gen. Laws §§ 42-28.6-1 *et seq.* (LEOBOR).

On November 28, 2006 Plaintiffs filed a Notice of Appeal in the Superior Court to appeal to the Supreme Court the Order regarding Plaintiffs' Complaint for Declaratory Relief and the Declaratory Judgment, both of which were entered on November 15, 2006.

On December 6, 2006, the RI Superior Court ordered that the plaintiff's motion for stay pending appeal to the Supreme Court is denied.
The casework is enclosed (without appendixes).

On October 18, 2006, defendants filed a memorandum of law in opposition to the plaintiff's declaratory judgment action.

On November 3, 2006 a hearing was held before Superior Court Justice Stephen J. Fortunato Jr. where the plaintiff's complaint was denied.

On November 15, 2006 the court denied the Plaintiff's Complaint to invalidate in its entirety Section 18 ½ -2 of the Providence Code of Ordinances; as provided PERA may conduct investigations and hearings of alleged misconduct and if sustained may make recommendations deemed appropriate and consistent with the disciplinary matrix to the Chief of Police. The Ordinance is not to be construed or interpreted as authorizing PERA to impose discipline directly on any law enforcement officer nor to require the Chief of Police of the City of Providence to impose discipline without affording the officer the full protections of the Law Enforcement Officers' Bill of Rights Act, R.I. Gen. Laws §§ 42-28.6-1 *et seq.* (LEOBOR).

On November 28, 2006 Plaintiffs filed a Notice of Appeal in the Superior Court to appeal to the Supreme Court the Order regarding Plaintiffs' Complaint for Declaratory Relief and the Declaratory Judgment, both of which were entered on November 15, 2006.

On December 6, 2006, the RI Superior Court ordered that the plaintiff's motion for stay pending appeal to the Supreme Court is denied.

The casework is enclosed (without appendixes).

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS
PROVIDENCE COUNTY SUPERIOR COURT

PROVIDENCE LODGE NO. 3, :
FRATERNAL ORDER OF POLICE; :
KEITH LAFAZIA; and :
JOSEPH SARRASIN :
: v. : C.A. No. PC2006-4859
PROVIDENCE EXTERNAL REVIEW :
AUTHORITY; THE CITY OF :
PROVIDENCE; and DAVID N. CICILLINE, :
in his capacity as Mayor of the :
City of Providence :

PLAINTIFFS' MEMORANDUM IN SUPPORT OF
DECLARATORY JUDGMENT

INTRODUCTION

This action was brought by Providence Lodge No. 3, Fraternal Order of Police [the FOP] and two Providence police officers to challenge the validity of Providence Code of Ordinances § 18½-2, the ordinance enacted by the Providence City Council that purports to establish the Providence External Review Authority [PERA]. By the terms of the challenged ordinance, PERA is empowered to "review all allegations of misconduct on the part of sworn officers of the city police department," to investigate such allegations, to conduct evidentiary hearings with respect to such allegations, to render decisions with findings of fact and a recommendation of discipline. If PERA finds a violation, the Chief of Police is required by the ordinance to impose the disciplinary penalty recommended by PERA. The plaintiff police officers are presently subjects of an investigation and hearing by PERA. The FOP represents the interests all Providence police officers.

The plaintiffs request a judgment of this Court declaring § 18½-2 invalid and

unenforceable. As shown below, the PERA ordinance is in conflict with and violates the Law Enforcement Officers' Bill of Rights, R.I. GEN. LAWS §§ 42-28.6-1 *et seq.* [LEOBOR]. The General Assembly, exercising its legislative authority over a matter of statewide concern, established LEOBOR as the sole and exclusive procedure and remedy for permanently appointed police officers in Rhode Island who are under investigation for any reason that could lead to disciplinary action, demotion, or dismissal. The PERA ordinance is in conflict with LEOBOR because it purports to provide an alternate forum and procedure for the investigation of and hearing on disciplinary complaints against Providence police officers; moreover, it fails to provide the procedural and substantive protections mandated under LEOBOR. The PERA ordinance thus intrudes upon the constitutional powers of the legislature pursuant to R.I. CONST., Art. 13, § 4, and is in excess of the City's legislative powers under R.I. CONST., Art. 13, § 2. Alternatively, but equally invalidating, because the General Assembly expressly provided that LEOBOR is the exclusive "remedy" in police-disciplinary proceedings, § 18½-2 is preempted by LEOBOR. Finally, the ordinance also violates the Providence Home Rule Charter because it permits PERA to usurp the duties and responsibilities assigned to the public safety commissioner under the charter. Each of these points compels a declaration that the PERA ordinance is invalid and thus unenforceable.

FACTS AND BACKGROUND

Prior to the enactment of LEOBOR in 1976, the disciplining of police officers was left to a crazy-quilt of individual municipal forums, each having rules, procedures, and composition particular to each city and town. *See e.g. Weeks v. Personnel Bd. of Review of North Kingstown*, 118 R.I. 243, 373 A.2d 176 (R.I. 1977) (officer's dismissal by chief was upheld by the North Kingstown Board of Review); *Welsh v. Personnel Bd. of City of Pawtucket*, 101 R.I.

187, 221 A.2d 476 (R.I. 1966) (officer's dismissal by director of public safety was upheld by the Personnel Board of the City of Pawtucket); *Howland v. Thomas*, 98 R.I. 470, 204 A.2d 640 (R.I. 1964) (mayor dismissed officer, after excluding officer's attorney from interrogation, and city personnel board sustained mayor's guilty finding but reduced the discipline to suspension); *Gartsu v. Coleman*, 82 R.I. 103, 106 A.2d 103 (R.I. 1954) (police discipline reviewed by the statutorily established "board of police commissioners for the city of Woonsocket"). In 1976 the General Assembly, exercising its "sovereignty over the regulation of police affairs," *Bruckshaw v. Paolino*, 557 A.2d 1221, 1223 (R.I. 1989), enacted LEOBOR to eliminate the balkanization of police discipline and to establish a uniform statewide system for police-officer discipline. LEOBOR established an exclusive remedy and set procedural and substantive protections that are in effect to this day.

In 2002, the Providence City Council enacted an ordinance, codified as Providence Code of Ordinance § 18½-2, which created the Providence External Review Authority. Appendix [A.] 2-7.¹ PERA was given authority to investigate claims of police-officer misconduct and to "conduct hearings and make findings of fact with respect to those allegations." Ord. § 18½-2(a); A. 2. PERA "shall be comprised of 20 members" who are appointed by various city officials: the mayor appoints 3 members, the president of the city council appoints 2 members, members of the city council appoint 1 member each, and the executive director of the city human relations commission appoints 1 member. Ord. § 18½-2(c); A. 3. The police chief and the FOP do not select any PERA members.

PERA is given authority under the ordinance to adopt rules and regulations. Ord. § 18½-2(e); A. 4. Consistent with that authority, PERA is required to promulgate a "disciplinary

matrix." Ord. § 18½-2(s); A. 7. In fact, PERA has adopted regulations and has promulgated a disciplinary matrix. A. 8-14 (disciplinary matrix); 15-25 (regulations).

As provided by Ord. § 18½-2, after a complaint is filed with PERA, the executive director is to review it and determine if it should be dismissed, forwarded to mediation, or transmitted for full investigation. Ord. § 18½-2(l); A. 5-6. Full investigations are conducted by civilian investigators who are hired by PERA. Ord. § 18½-2(a) and (o); A. 2, 6. After the investigator has completed the investigation, the executive director either dismisses the complaint or forwards it to full hearing. Ord. § 18½-2(p); A. 6. If a hearing is set, 5 members are randomly selected from the 20-member pool to serve on the hearing panel. Ord. § 18½-2(c) and (p); A. 3-4, 6. Not more than 3 former police officers may be included in the pool of 20, and not more than 1 former police officer can serve on a 5-member hearing panel. *Id.*

PERA has the authority to seek the issuance of subpoenas by the City Council for the evidentiary hearing, with the attendant power to request contempt sanctions against "anyone who fails to comply with any subpoena so issued." Ord. § 18½-2(q); A. 6-7. Moreover, subpoena or no subpoena, all city employees are required promptly to respond to "lawful requests" for information, and "[t]he failure of any official or employee to respond to lawful requests for such information and date shall be deemed an act of misconduct." Ord. § 18½-2(r); A. 7.

The PERA hearing panel is to "weigh and consider all reliable and credible evidence" presented at the evidentiary hearing, Ord. § 18½-2(p), A. 6, and then render a decision based on the preponderance of the evidence. Ord. § 18½-2(s); A. 7. If the hearing panel finds police-officer misconduct it must issue a written decision with findings of fact and identifying the "level violation," plus making a "recommendation of discipline." *Id.* The police chief must then discipline the officer in accordance with PERA's disciplinary matrix, and must supply a written explanation for the discipline selected:

When a complaint is sustained, findings of fact and the determination shall be submitted to the chief of police. The chief shall impose discipline based upon the level of violation as found in the disciplinary matrix to be promulgated by [PERA] * * *. The chief of police shall also provide the authority, the city council, and the mayor with a written explanation of the reason(s) for his/her disciplinary decision. The hearing panel report and the police chief's explanation for his/her decision shall be available to the public provided that the name of the complainant and/or respondent shall be kept [sic].

Ord. § 18½-2(s); A. 7 (emphasis added).

Since the ordinance was enacted in 2002, the 20 members of the authority have been appointed and its administrative positions have been filled. PERA has adopted regulations and has promulgated its disciplinary matrix. The complaint against the police officers that triggered this action is the first one processed beyond the executive director's preliminary investigation.

The complaint against the plaintiff police officers was filed by Darrel Wyche on November 8, 2005. PERA complaint; A. 26-37. PERA sent notice of the complaint and PERA's investigation to the plaintiff police officers on March 10, 2006. PERA notices; A. 38-41. In the notices, the officers were told to contact PERA's investigators by March 17, 2006 "to schedule an appointment for an interview regarding these allegations." PERA informed the officers that the ordinance required them to "respond to requests for information necessary for PERA to carry out its responsibilities under the Ordinance." *Id.* On August 25, 2006, PERA sent a second notice to the officers, again demanding that they "schedule an appointment for an interview" and specifying that their failure to cooperate may be deemed "misconduct." PERA notices; A. 43-44. On the same day, PERA sent the officers a separate notice that their PERA hearing would take place on September 21, 2006, and that if PERA sustains the complaint the officers "will be subject to discipline as set out in the enclosed Disciplinary Matrix." PERA notices (of evidentiary hearing); A. 44-47.

Plaintiffs and the FOP filed this action to challenge the validity of the PERA disciplinary scheme and its immediate application to the plaintiff police officers. Rather than engage in litigation over initial injunctive relief, the parties agreed to a stand-still pending the Court's consideration of the merits of plaintiffs' declaratory-judgment claim.

ARGUMENT

I. The PERA ordinance is unconstitutional and ultra vires, and is preempted as well, because the General Assembly has declared LEOBOR the exclusive remedy for police-officer discipline.

Three theories cascade and intersect here, each drawn from the organic arrangement of state and local government, and all leading only to the conclusion that the PERA ordinance is invalid and unenforceable because the City has no authority to legislatively establish a process that could lead to police-officer discipline. First, the PERA ordinance is *unconstitutional* because the subject-matter of the legislation — police-officer discipline — is a statewide concern which is exclusively within the sovereign legislative power of the General Assembly. Municipalities cannot legislate on issues of statewide interest. *Marran v. Baird*, 635 A.2d 1174, 1177 (R.I. 1994). Second, the PERA ordinance is an *ultra vires* act of the City. LEOBOR is a general law that applies alike to all municipalities. Municipalities are precluded from legislating where the General Assembly has committed itself. See *Town of East Greenwich v. O'Neil*, 617 A.2d 104, 111 (R.I. 1992). Third, PERA is *preempted* by LEOBOR. The General Assembly has expressly provided that LEOBOR is the "sole and exclusive remedy" in police-officer discipline matters. Moreover, even where there is not express preemption, a municipality may not enact an ordinance that conflicts with a state statute on the same subject. PERA seriously conflicts with LEOBOR, and on that ground is preempted as well. *Town of Warren v. Thornton-Whitehouse*, 740 A.2d 1255, 1261 (R.I. 1999).

It does not matter which of the three intersecting and overlapping theories this Court adopts in its ultimate analysis: all roads lead to Rome. The City simply does not have the authority to enact a PERA-type police-officer disciplinary process, much less one that conflicts with state law and denies the complained-against police officers the procedural and substantive safeguards established by the General Assembly in LEOBOR. Thus, the Court should declare the PERA ordinance invalid and unenforceable.

- A. Because police-officer discipline is a matter of statewide concern, the General Assembly's power in that area is exclusive and the PERA ordinance is an unconstitutional intrusion by the City on that exclusive power.

While the Home Rule Amendment, R.I.CONST. Art. 13, "altered the traditional rule that cities and towns have 'no inherent right to self-government,'" *Marran v. Baird*, 635 A.2d at 1177, it did not alter the exclusive power of the General Assembly to legislate on matters of statewide concern. "Municipalities may not, however, legislate on matters of statewide concern. The power of the General Assembly remains exclusive in those areas." *Id.*, quoting *Westerly Residents for Thoughtful Development, Inc. v. Brancato*, 565 A.2d 1262, 1264 (R.I.1989). The impact of the Home Rule Amendment was recently summarized:

Traditionally, municipalities had no inherent right to self-government. [Citations omitted.] The 1951 enactment of the home rule amendment, now designated article 13 of the Rhode Island Constitution, "altered this traditional view by empowering cities and towns to legislate with regard to all local matters." *Id.* * * *

But the legislative power conferred by article 13 is not unfettered. The Legislature continues to retain "power to act in relation to the property, affairs and government of any city or town by general laws which shall apply alike to all cities and towns, but which shall not affect the form of government of any city or town." R.I. CONST. art. 13, sec. 4. Thus, municipalities may not legislate on matters of statewide concern, and the power of home rule is subordinate to the General Assembly's unconditional power to legislate in the same areas.

Amico's Inc. v. Mattox, 789 A.2d 899, 903 (R.I. 2002) (emphasis added).

There is a "limited list of matters of statewide concern held to be within the exclusive sovereignty of the state." *Westerly Residents*, 565 A.2d at 1264. The "regulation of police affairs" is clearly on the list, and with it comes the power to establish standards for investigation and hearing of matters involving police-officer discipline :

[I]t is the state's duty to preserve the public peace and good order, to enforce the laws, to suppress crime and to protect liberty and property; that the police officers who discharge the state's responsibility in these respects, even though they may have been appointed by municipalities under a delegation of power, act for all inhabitants of the state and not merely for those of a particular community; that they are officers who perform a state duty and are subject to full control by the state.

Marro v. General Treasurer of City of Cranston, 108 R.I. 192, 196, 273 A.2d 660, 661 (R.I. 1971); *see also Lynch v. King*, 120 R.I. 868, 877, 391 A.2d 117, 122 (R.I. 1978) (holding that the home rule amendment "in no way affected the sovereignty of the state with regard to the exercise of police power since police officers, while they may be appointed by the individual city or town, act for all the inhabitants of the state and not only for the residents of the appointing community"); *Bruckshaw v. Paolino*, 557 A.2d at 1223 ("[t]his court has held that the state maintains sovereignty over the regulation of police affairs, the conduct of business, licensing, education, and elections").

R.I. CONST., Art. 13, § 2 empowers "[e]very city and town" to legislate on matters "relating to its property, affairs and government * * *," but it gives no authority to the city to legislate on a matter of statewide concern.² Ord. § 18½ is unconstitutional because it constitutes local legislation on a matter of statewide concern that falls within the exclusive

2. To be sure, the legislature can "grant permission to a municipality to legislate in areas already regulated by the general laws." *Local No. 799, Inter. Ass'n of Firefighters v. Napolitano*, 516 A.2d 1347, 1349 (R.I. 1986). The legislature has, however, extended no such permission to the City to enact a parallel police-officer disciplinary process. To the contrary, the legislature has expressly made LEOBOR the *sole* and *exclusive* remedy for police officers facing discipline.

legislative power of the General Assembly.

- B. The General Assembly adopted LEOBOR as a matter of statewide concern, and as the exclusive remedy for police-officer discipline. The City's attempt to legislate in that area is *ultra vires*.

In the preceding section plaintiffs have shown that the PERA ordinance intrudes upon and thus violates the General Assembly's exclusive power over matters of statewide concern. Here, plaintiffs show the other side of the coin: that the City has exceeded its own authority in enacting an ordinance affecting a matter of statewide concern. That being so, the PERA ordinance is invalid as *ultra vires*.

As shown above, municipal legislative authority under the Home Rule Amendment, R.I. CONST. Art. 13, § 2, is limited to ordinances affecting the "property, affairs and government" of that city or town. Absent express permission from the General Assembly to legislate in a particular area, the municipality is not empowered to adopt ordinances affecting a matter of statewide concern. The City acts *ultra vires*, and its enactment is invalid, when it purports to act in an area of statewide concern. *Town of East Greenwich v. O'Neil*, 617 A.2d at 111.

PERA is *ultra vires* and invalid because the city simply did not have the power to legislate on this matter:

In *Town of Warren v. Thornton-Whitehouse*, 740 A.2d 1255 (R.I. 1999), our Supreme Court stated "a municipal ordinance is preempted if it conflicts with a state statute on the same subject." Further, in the seminal case of *Lynch v. King*, 120 R.I. 868, 391 A.2d 117 (1978), our Supreme Court held that LEOBOR does not violate the home rule amendment since police officers, while they may be appointed by an individual city or town, act for all the inhabitants of the state, and not only for the residents of the appointing community, and the statute applies to all cities and towns and does not affect their government. * * * The LEOBOR is the exclusive statute governing the disciplinary action (including termination) against state and municipal law enforcement officers.

Hornoff v. City of Warwick, C.A. No. PC 2003-4264, 2004 R.I.Super. LEXIS 21 (R.I.Super.Ct.

January 6, 2004) (Rodgers, J.) (emphasis added); *see also Lynch v. King*, 120 R.I. at 876, 391 A.2d at 122 ("In a long line of decisions, we have sustained the right of the General Assembly to control the police as an incident of [its] power."); *Moats v. City of Hagerstown*, 597 A.2d 972, 975-76 (Md. 1991) ("The language, legislative history and comprehensive nature of the Law Enforcement Officers' Bill of Rights establishes that the procedures provided by the Act are an officer's exclusive remedy in matters of departmental discipline.").

The Rhode Island Supreme Court "upheld the validity of [LEOBOR] from a home rule challenge, stating that the enactment of the thirteenth 'amendment in/ not way affected the sovereignty of the state with regard to the exercise of the police power since police officers, while they may be appointed by the individual city or town, act for all the inhabitants of the state and not only for the residents of the appointing community.'" *Town of Lincoln v. Lincoln Lodge No.* 22, 660 A.2d 710, 719 (R.I. 1995) (quoting *Lynch v. King*, 391 A.2d at 122). Our high court joined the "other courts [that] have held that constitutional provisions such as ours do not permit a home rule municipality to impinge upon the state's sovereign power to control police affairs." *Marro v. General Treasurer of City of Cranston*, 108 R.I. at 197, 273 A.2d at 663. PERA is therefore *ultra vires*, an invalid and unenforceable attempt by the City to legislate in an area beyond its authority.

C. The General Assembly's adoption of LEOBOR preempts the attempt by the City through PERA to adopt an alternate remedy in police-officer disciplinary matters.

In *Town of Warren v. Thornton-Whitehouse*, 740 A.2d at 1261, the supreme court outlined two ways in which a local ordinance or regulation may be preempted. "First, a municipal ordinance is preempted if it conflicts with a state statute on the same subject. * * * Second, a municipal ordinance is preempted if the Legislature intended that its statutory scheme

completely occupy the field of regulation on a particular subject." Here, assuming that the City had the authority to adopt a police-discipline process (which it did not), PERA is preempted by LEOBOR. Not only is LEOBOR intended to be the sole and exclusive remedy in police-officer discipline cases, but PERA is utterly and intractably in conflict with LEOBOR. Accordingly, PERA is preempted by LEOBOR, and is thus invalid and unenforceable.

1. The legislature expressly intended LEOBOR to be the sole and exclusive remedy in police-officer discipline matters.

In enacting LEOBOR the General Assembly eliminated the hodge-podge of local procedures and forums that were then in place to deal with police-officer discipline. LEOBOR established a uniform comprehensive statewide procedure for the investigation, determination, and resolution of police-officer disciplinary matters: "the Legislature has created a specific statute outlining a comprehensive mode of procedure to govern the investigation of a police officer for misconduct." *Town of North Kingstown v. Local 473, Intern. Broth. of Police Officers*, 819 A.2d 1274, 1276 (R.I. 2003). LEOBOR applies "[w]henever a law enforcement officer is under investigation * * * for any reason that could lead to disciplinary action, demotion, or dismissal * * *," R.I. GEN. LAWS § 42-28.6-2, and specifies that the investigation "shall be conducted under the following conditions * * *." *Id.* (emphasis added). These provisions seem clear enough that the legislature intended the LEOBOR procedure to apply "whenever" a police officer faces a disciplinary investigation, but if there were any doubt about the legislature's intent, LEOBOR further specifically mandates that its procedures are *sole* and *exclusive*:

The remedies contained herein shall be the sole and exclusive remedies for all law enforcement officers subject to the provisions of this chapter.

Consistent with the language of LEOBOR, the Rhode Island Supreme Court has repeatedly held:

The Officers' Bill of Rights serves as the exclusive remedy for permanently appointed law enforcement officers who are under investigation and subject to disciplinary action.

In re Denisewich; 643 A.2d 1194, 1196 (R.I. 1994)(emphasis added); *City of East Providence v. McLaughlin* 593 A.2d 1345, 1348 (R.I. 1991); *In re Sabetta*, 661 A.2d 80, 83 (R.I. 1995). Moreover, the supreme court has specifically held that LEOBOR "represents the entire body of rights the Legislature intended to apply to police officers in this type of context," *Town of North Kingstown v. Local 473*, 819 A.2d at 1276, and that "the Bill of Rights [is] the only source of remedies available to officers being interrogated." *Id.*

The comprehensive nature of the legislation, coupled with the supreme court's recognition of the legislature's intent to establish an exclusive remedy, leads necessarily to the conclusion that the General Assembly intended to preempt the field of police-officer discipline with LEOBOR. The City's attempt to create PERA as an alternate procedure for the investigation, hearing, and determination of complaints against police officers intrudes on the procedures established by the General Assembly and violates LEOBOR's exclusivity clause. Accordingly, because the General Assembly has expressly and intentionally preempted the subject matter, the PERA ordinance is invalid and unenforceable. *See, e.g., Wood v. Peckham*, 80 R.I. 479, 482-84, 98 A.2d 669, 670-71 (1953) (invalidating town camp-ground ordinance because it "invade[d] a field which the state has intentionally and specifically covered and pre-empted"); *Town of Gloucester v. R.I. Solid Waste Management Corp.*, 120 R.I. 606, 608-09, 390 A.2d 348, 349 (1978) (invalidating on preemption grounds a municipal ordinance in conflict with Waste Management Act).

2. PERA is preempted because it conflicts with LEOBOR both procedurally and substantively.

LEOBOR "was designed to protect the rights of police [officers] threatened with disciplinary action." *Lynch v. King*, 120 R.I. at 875, 391 A.2d at 121. It "was enacted to protect police officers from infringements of their rights in the course of investigations into their alleged improper conduct." *In re Denisewich*, 643 A.2d at 1196.

[T]he Law Enforcement Officers' Bill of Rights * * * represents the entire body of rights the Legislature intended to apply to police officers in this type of context * * *. The Bill of Rights provides officers under investigation for misconduct with a comprehensive scheme of protection. The statute delineates how an investigation should be conducted and how a hearing should be conducted in the event that the investigation should lead to a recommendation that the officer be punished, and provides an officer a means of appealing an adverse decision by the hearing committee.

* * * * *

The comprehensiveness of the Bill of Rights creates a mosaic of procedural protections to officers being interrogated for misconduct * * *. This, we believe, reflects a legislative intent to make the Bill of Rights the only source of remedies available to officers being interrogated.

Town of North Kingstown v. Local 473, 819 A.2d at 1276.

PERA is preempted by LEOBOR because it conflicts with the "comprehensive scheme of protection" provided by the LEOBOR, a general law of statewide application. PERA is thus invalid and unenforceable.

a. PERA conflicts with and violates the plaintiff police officers' procedural rights mandated by LEOBOR.

LEOBOR provides significant procedural protections, safeguards, and rights for the review of alleged misconduct by police officers during the investigative and interrogation process which are not provided for under the PERA ordinance. LEOBOR provides, in part:

Conduct of Investigations. — Whenever a law enforcement officer is under investigation or subjected to interrogation by a law enforcement agency, for any

reason which could lead to disciplinary action, demotion, or dismissal, the investigation or interrogation shall be conducted under the following conditions:

* * * * *

(b) The interrogation shall take place at an office within the department previously designated for that purpose by the chief of police;

(c) The law enforcement officer under interrogation shall be informed of the name, rank, and command of the officer in charge of the investigation, the interrogating officer, and all persons present during the interrogation. All questions directed to the officer under interrogation shall be asked by and through one interrogator;

* * * * *

(e) The law enforcement officer under investigation shall be informed in writing of the nature of the complaint prior to any interrogation, and of the names of all complainants and witnesses;

* * * * *

(i) If any law enforcement officer under interrogation is under arrest, or is likely to be placed under arrest as a result of the interrogation, he or she shall be completely informed of all his or her rights prior to the commencement of the interrogation;

* * * * *

(m) No public statement shall be made prior to a decision being rendered by the hearing committee and no public statement shall be made if the officer is found innocent unless the officer requests a public statement * * *;

(n) No law enforcement officer shall be compelled to speak or testify before, or be questioned by, any non-governmental agency.

R.I. GEN. LAWS § 42-28.6-2; A. 49-50 (emphasis added).

Under Ord. § 18½-2, PERA investigates all allegations of misconduct, and hires civilians (not law officers) to conduct its investigations. Ord. § 18½-2(a); A. 2. Upon a finding of probable cause, PERA initiates its own investigation into the alleged misconduct of a police officer. Ord. § 18½-2(o); A. 6. The ordinance provisions relating to investigations and interrogations plainly violate the express procedural protections and rights of law enforcement officers mandated by § 42-28.6-2(b), (c), (e), and (n).

Under the ordinance, the PERA hearing panel is to be comprised of members of the general public. Ord. § 18½-2(c); A. 3-4. All proceedings of PERA hearing panels are to be held in accordance with applicable law governing open meetings. Ord. § 18½-2(f); A. 4. Moreover, all PERA complaints are to be kept on file without regard to subsequent action of the

Executive Director and PERA, and shall be available to the public, provided the name of the complainant and/or respondent shall be kept confidential to the extent required by law. Ord. § 18½-2(l); A. 5-6.

The PERA hearing panel report and the police chief's explanation of the reasons for his disciplinary decision will be available to the public provided that the name of the complainant and/or respondent shall be kept confidential to the extent required by law. Ord. § 18½-2(s); A. 7. These ordinance provisions relating to the filing and the release of information are contrary to the express provisions of R.I. GEN. LAWS § 42-28.6-2(i) and (m).

A fundamental conflict between the ordinance and LEOBOR is found in the initial investigation of a complaint. Under LEOBOR, after a complaint is filed, the accused officer is investigated or interrogated by a member of the police department, whose identity and rank are known to the officers under investigation. R.I. GEN. LAWS § 42-28.6-2(c); A. 49. Under the ordinance, PERA's executive director initially determines if the complaint should either dismissed, forwarded to mediation, or transmitted for full investigation. Ord. § 18½-2(l); A. 5-6. At the discretion of the executive director, the complaint will then be investigated by a civilian investigator who is not required to reveal his or her credentials to the accused officers. Ord. § 18½-2(a) and (o); A. 2, 6. The ordinance's provisions relating to the investigation and interrogation of an accused officer are therefore in violation of LEOBOR's express provisions for this stage of the proceedings.

Another conflict between ordinance and statute is in the composition of the review panel overseeing the evidentiary hearings. Under R.I. GEN. LAWS §§ 42-28.6-1(2)(i) and 42-28.6-4, a law enforcement officer has the right to a hearing before a committee consisting of three active or retired law enforcement officers. A. 48, 52-53. However, the PERA committee is vastly different in its composition in that it has 20 members (selected by various city officials) from which 5 members are randomly selected to serve on hearing panels. Ord. § 18½-2(c); A. 3-4.

The ordinance goes on to stipulate that there cannot be more than 3 former law enforcement officers appointed to PERA and not more than 1 former law enforcement officer can serve on any hearing panel. *Id.* (This means that the hearing panel could very well have *no* former officers on it.) The ordinance's provisions relating to the hearing committee therefore also violate LEOBOR's express provisions regarding the composition of the review board.³

Should a complaint be sustained by PERA, the chief of police *must* impose a discipline in accordance with a "disciplinary matrix" developed by PERA. Ord. § 18½-2(s); A. 7. In contrast, LEOBOR provides specific and profound procedural protections and rights for law enforcement officers facing suspension. R.I. GEN. LAWS § 42-28.6-13; A. 62-63. The ordinance is therefore in derogation of the LEOBOR provisions on penalties.

Finally, a right of appeal is provided for under LEOBOR, but not under the ordinance. LEOBOR provides that "[a]ppeals from all decisions rendered by the hearing committee shall be to the superior court in accordance §§ 42-35-15 and 42-35-15.1." R.I. GEN. LAWS § 42-28.6-12. A. 61. The ordinance's lack of any provision for the right to appeal a PERA determination directly conflicts with the mandated right of appeal under LEOBOR.

3. The Rhode Island Supreme Court has recognized the compelling reasons for the legislature's composition of the LEOBOR hearing committee:

The clear purpose behind the requirement that hearing committee members be "active law enforcement officers" is to afford protection to those charged with departmental violations by ensuring that the hearing committee is composed of individuals who are familiar with departmental practices and procedures during the appropriate time frame. [Citation omitted.] Officers carrying out the daily routine of police work contemporaneously with the alleged infraction will be in the best position to judge another officer's actions. Thus, the purpose of protecting the officers' rights is served even when a committee member, at the time of rehearing, has retired from active duty—provided that member was an "active law enforcement officer" at the time the committee originally convened to decide the case.

In re Denisewich, 643 A.2d at 1198 (emphasis added). PERA strips the charged police officer of this statutorily guaranteed protection.

These significant and substantial procedural conflicts between LEOBOR and PERA alone are enough to render PERA invalid. *State v. Berberian*, 80 R.I. 444, 448, 98 A.2d 270 (R.I. 1953) ("[A] city may not pass an ordinance inconsistent with a statute."). The comprehensive procedural protections provided by LEOBOR lie at its heart. PERA denies most of those protections. Accordingly, this Court should render a declaratory judgment holding Ord. § 18½-2 to be invalid and unenforceable.

- b. PERA conflicts with and violates the plaintiff police officers' substantive rights under LEOBOR by requiring the imposition of a penalty in accordance with the disciplinary matrix created by PERA.

Under LEOBOR, police officers facing departmental charges may request a hearing and review by a three-member committee.⁴ R.I. GEN. LAWS §§ 42-28.6-1 and 42-28.6-4. The committee has wide discretion when fashioning discipline after finding misconduct:

The hearing committee is not bound by the recommendations of the officer's departmental superiors. The committee has great discretion to modify in whole or in part the recommended sanction presented by the charging authority.

Culhane v. Denisewich, 689 A.2d 1062, 1064 (R.I. 1997) (emphasis added). LEOBOR also mandates significant restrictions when a suspension is to be imposed. R.I. GEN. LAWS § 42-28.6-13; A. 62-63.

The PERA ordinance conflicts with this statutory mandate because PERA not only investigates, interrogates, and determines if misconduct has occurred (and the level of the misconduct), but PERA also imposes its own disciplinary matrix from which the police chief *must* choose a punishment. The ordinance states:

4. If the LEOBOR investigation results in the recommendation of disciplinary action, then the accused has a right to a hearing before a three-member committee — one member chosen by the accused, one member chosen by the charging law enforcement agency, and one member to be jointly selected by the first two members. R.I. GEN. LAWS § 42-28.6-4; A. 52-54.

When a complaint is sustained, the findings of fact and the determination shall be submitted to the chief of police. The chief shall impose a discipline based upon the level of violation as found in the disciplinary matrix, to be promulgated by [PERA] in accordance with subsection (e)(1). The chief of police shall also provide [PERA], the city council, and the mayor with a written explanation of the reason(s) for his/her disciplinary decision.

Ord. § 18½-2(s); A. 7 (emphasis added). The ordinance's usurpation of LEOBOR is complete: not only does it purport to displace the procedural safeguards and protections provided by LEOBOR, but it purports to displace the substantive safeguards and rights guaranteed under LEOBOR. Perhaps belaboring this point, the well-established law in this state bears repeating:

[LEOBOR] provides an exclusive remedy for permanently appointed law enforcement officers who are under investigation or subject to interrogation by a law enforcement agency for any reason which could lead to disciplinary action, demotion or dismissal. The statute delineates the procedural and substantive rights to which the officer is entitled including notice, a hearing at which he may present witnesses and cross-examine the witnesses produced by the agency, and the right to *de novo* review in the Superior Court.

Lynch v. King, 120 R.I. at 870 n.1; 391 A.2d at 119 n.1.

In Maryland, which has a similar Law Enforcement Officers' Bill of Rights, the Maryland Court of Special Appeals has noted that alternate forums like PERA are untenable in the face of the rights that LEOBOR guarantees police officers:

We do not believe that the legislature ever intended to erect a protective shield around a police officer when the officer is confronted by an investigation conducted by a law-enforcement agency and at the same time deny that protection to the officer if the investigation is made by another type of Commission or agency. Such a result would cause the "Law Enforcement Officers' Bill of Rights" to be little more than a verbalizing of "rights" which are devoid of substance.

Prince George's County v. Comm. of Human Relations, 392 A.2d 105, 112-13 (Md.Ct.Spec.App. 1978), *vacated as moot*, 401 A.2d 661 (Md.Ct.Spec.App. 1979).⁵

5. While the subsequent vacating of this decision due to mootness may have negated the precedential value of the decision in Maryland, the court's forceful logic in rendering this (continued...)

PERA's substantive provision for the imposition of discipline is completely in conflict with the provisions of LEOBOR. Accordingly, this Court should uphold LEOBOR's exclusive substantive protections by rendering a declaratory judgment holding Ord. § 18½-2 to be invalid and unenforceable.

II. The PERA ordinance is unenforceable because it violates Providence's Home Rule Charter's allocation of duties to the Commissioner of Public Safety.

The PERA Ordinance purports to limit the authority of the commissioner of public safety (i.e., the chief of police) when it comes to disciplining the city's law enforcement officers. Ord. 18½-2(s) limits the chief's authority in disciplining officers to merely picking a discipline within PERA's discipline matrix after PERA makes a determination of misconduct and the degree of the misconduct. The ordinance conflicts, however, with the City's Home Rule Charter provisions concerning the commissioner's authority. The charter provides that "[t]he commissioner shall * * * [b]e responsible for the administration and discipline of the police department [and shall h]ave the authority to make all rules * * * [which] shall provide for the * * * discipline and control of the members of the police department." Providence Home Rule Charter, Art. X, § 1001(a) (emphasis added). This provision clearly establishes the commissioner's complete authority over the "administration and discipline" of the police force; the PERA ordinance conflicts with and invades the commissioner's charter-based authority and purports to place a degree of control over the administration and discipline of the police force in the hands of PERA.

5. (...continued)

particular holding cannot be ignored. The holding was subsequently reaffirmed *sub silentio* when the Maryland Court of Appeals later held that the LEOBOR "procedures are an officer's exclusive remedy, at least with regard to alternate procedures under local law. *Moats v. City of Hagerstown*, 597 A.2d at 975-76.

When there is a conflict between charter and ordinance, the provisions of the charter prevail over the ordinance:

Since the state statutes and the state constitution constitute the organic law of the state and ordinances inconsistent therewith are invalid, it follows that ordinances that are inconsistent with the provisions of the charter are illegal and inferior to the provisions of the charter.

Borromeo v. Personnel Board of Town of Bristol, 117 R.I. 382, 385, 367 A.2d 711, 713 (R.I. 1977). "As a result the provisions of the [PERA] ordinance neither prevail over nor can they be considered a modification of the provisions of the charter." *Id.*

Here, this Court should render a declaratory judgment holding Ord. § 18½-2 to be invalid and unenforceable because the City Council has improperly attempted invade the commissioner's charter-based powers and to impose obligations upon the commissioner that are inconsistent with the charter's provisions on the same subject.

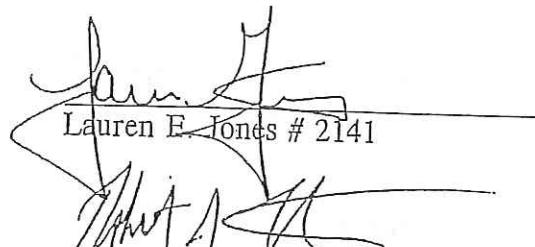
CONCLUSION

For the reasons set forth in detail above, plaintiffs FOP and the two police officers respectfully request that this Court find and hold that the Providence City Council's adoption of the PERA ordinance intrudes upon the constitutional powers of the legislature pursuant to R.I.CONST. Art. 13, § 4, and is beyond the legislative authority of the City under R.I.CONST. Art. 13, § 2. Moreover, PERA is preempted by LEOBOR, is in conflict with the police-officers' rights established by LEOBOR, and violates the legislatively-mandated exclusivity of the procedural and substantive safeguards of LEOBOR. Finally, PERA is in violation of the City Home Rule Charter because it intrudes upon the charter-based powers of the Commissioner

of Public Safety. Accordingly, plaintiffs respectfully request that this Court rule that Ord. § 18½-2 is invalid and unenforceable, and enter a declaratory judgment to that effect.

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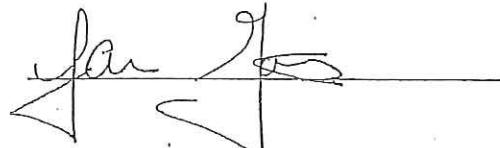


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CERTIFICATION

On 10/03/06 a true copy of the foregoing was served on all counsel of record, listed below, by see below.



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STATE OF RHODE ISLAND
PROVIDENCE, SC.

SUPERIOR COURT

PROVIDENCE LODGE NO. 3, :
FRATERNAL ORDER OF POLICE; :
KEITH LAFAZIA; and :
JOSEPH SARRASIN :
vs. :
C.A. No. PC 06-4859

PROVIDENCE EXTERNAL REVIEW :
AUTHORITY; THE CITY OF PROVIDENCE; :
and DAVID N. CICILLINE, in his capacity :
as Mayor of the City of Providence :

DEFENDANTS' MEMORANDUM OF LAW IN OPPOSITION TO
PLAINTIFFS' DECLARATORY JUDGMENT ACTION

INTRODUCTION

In this civil action the Plaintiffs ask this Court to strike down the civilian review process for the Providence Police Department enacted by the Providence City Council.

Although numerous redundant arguments are asserted, the heart of the Complaint is the contention that the Providence External Review Authority (PERA) process is inconsistent with and, thus, preempted by the Law Enforcement Officers Bill of Rights Act.

(LEOBOR). In their zeal to avoid civilian review at all costs, the FOP ignores two fatal legal flaws to this challenge: First, the LEOBOR only applies to investigations and activities undertaken by a "law enforcement agency" and PERA is not, by definition, such an agency. R.I.G.L. § 42-28.6-2. Second, the final "recommendation" by PERA to the Chief of Police is just that, a *recommendation*. Providence Code of Ordinances §18½-2(s). As a "preliminary proceeding not resulting directly in disciplinary action," the PERA process does "not have to meet the requirements of the LEOBOR." *City of*

East Providence v. McLaughlin, 593 A.2d 1345, 1351 (R.I. 1991). Consequently, for both of these reasons the Defendants urge the Court to sustain the validity of the Ordinance 18½-2 and deny and dismiss Plaintiffs' prayer for injunctive relief.

BACKGROUND

The Providence External Review Authority, ("PERA"), was established in 2002 by Providence City Ordinance No. 614 (Chapter 2002-39) to provide a system of civilian oversight over the Providence Police Department. PERA has the mission and the authority to investigate and conduct hearings concerning allegations of misconduct on the part of sworn officers of the Providence Police Department. In addition, PERA has committed itself to public education regarding police procedures and constitutional rights.

Specifically, the Providence Code of Ordinances, § 18½-2 (the "PERA Ordinance"), mandates, "The authority shall review all allegations of misconduct on the part of sworn officers of the city police department, shall investigate the same, conduct hearings and make findings of fact with respect to those allegations.... Investigators hired by the authority shall be *civilians* who have appropriate prior experience or training." Ord. § 18½-2(a) (emphasis added).

PERA is authorized to receive complaints alleging misconduct by police officers including, but not limited to use of excessive force, inappropriate language or conduct, harassment, theft, and discrimination. Ord. § 18½-2(b). In addition, PERA "shall conduct such outreach activities as necessary to inform the public of the authority and its practices. Any outreach shall be conducted with sensitivity to the diversity of languages and cultures present in the city." Ord. § 18½-2(j).

Within thirty (30) days of the date on which a complaint is filed, PERA's executive director reviews the complaint and recommends to the authority: (1) the complaint be dismissed; (2) the complaint be forwarded to mediation; or (3) the complaint be transmitted for full investigation. Ord. § 18½-2(l). PERA provides an informal mediation process to resolve those complaints of a more minor nature. Ord. § 18½-2(n).

Should it be determined that a full investigation is warranted, the complaint is transmitted to a civilian authority investigator. Ord. § 18½-2(o). Upon completion of the investigation, the executive director may either dismiss the complaint or forward it to full hearing. Ord. § 18½-2(p). In the event of full hearing, PERA randomly selects a five (5) person panel from its members to consider the matter. The panel shall make all reasonable efforts to complete evidentiary hearings and render a written decision within sixty (60) days of the completion of the investigation. In those instances in which the complainant is otherwise unrepresented by counsel, the authority legal counsel shall present evidence to the panel on behalf of the complainant. The police officer may be represented by counsel and union representatives, may present evidence and conduct cross-examination of witnesses. *Id.*

Within thirty (30) days of the completion of an evidentiary hearing, the hearing panel issues a written report containing findings of fact, a determination of whether or not the complaint has been sustained by a preponderance of the evidence, if applicable, the level of violation described in the disciplinary matrix¹ developed by PERA and the Chief of Police, and a "recommendation" of discipline. Ordinance, § 18½-2(s). When PERA concludes that the complaint is sustained by the evidence presented, it submits its

¹ The Disciplinary Matrix is attached to the Plaintiffs Memorandum, App. pp. 8-14.

"recommendation" to the Chief of Police. Ordinance, § 18½-2(s). If, and only if, the Chief concurs with the "recommendation" and sustains the complaint, he/she shall impose discipline in accordance with the disciplinary matrix developed by PERA and the Chief. *Id.* In any case, the Chief of Police is obligated to provide PERA, the Mayor and the City Council with a written explanation of the reasons for his/her decision. *Id.*

ARGUMENT

Plaintiffs have advanced two principal arguments in support of their assertion that the PERA Ordinance is legally flawed. First, Plaintiffs contend that the PERA Ordinance is preempted by the LEOBOR. Although broken down into a confusing array of redundant labels,² which the Plaintiffs concede are "intersecting and overlapping," all of these contentions claim, in essence, that the PERA Ordinance is in conflict with the LEOBOR enacted by the General Assembly and, hence, preempted. Plaintiffs' Memorandum, p. 7. Second, the Plaintiffs urge the Court to interpret the Ordinance as an intrusion on the authority of the Commissioner of Public Safety and, hence, in contravention of the Home Rule Charter of the City of Providence.

Plaintiffs conclude their plea for the Court to embrace any one of these theories (or labels) with the curious analogy that "all roads lead to Rome," with "Rome" apparently symbolizing the imperial capital where officers are totally immune from any form of review or oversight by mere civilians at any time or under any circumstances. Plaintiffs' Memorandum, p. 7. The reality, however, is that Plaintiffs are roadblocked by two clear legal conclusions: (1) PERA is not a "law enforcement agency" and, hence, not subject to or limited by the LEOBOR; and (2) the PERA process results only in a

² These include: preemption, matters of "statewide concern", and "*ultra vires*."

"recommendation" to the Police Chief; it does not result "directly in disciplinary action ... [and does] not have to meet the requirements of the LEOBOR." *City of East Providence v. McLaughlin*, 593 A.2d 1345, 1351 (R.I. 1991); R.I.G.L. § 42-28.6-2; Ordinance, § 18½-2(s).

I. The General Assembly crafted the LEOBOR to apply only to activities undertaken by a "Law Enforcement Agency".

"The [LEOBOR] enacted in 1976, is the exclusive remedy for permanently appointed law-enforcement officers who are under investigation *by a law-enforcement agency* for any reason that could lead to disciplinary action, demotion, or dismissal." *City of East Providence v. McLaughlin*, 593 A.2d 1345, 1348 (R.I. 1991) (citing *Lynch v. King*, 120 R.I. 868, 870 n. 1, 391 A.2d 117, 119 n. 1 (1978))(emphasis added). Under this Act, any law enforcement officer facing charges that may result in punitive action may request a hearing before a committee comprised of three active law enforcement officers. R.I. Gen. Laws §§ 42-28.6-1 and 42-28.6-4. This committee has broad discretion to sustain, modify, or reverse the charges. See § 42-28.6-11; see also *Culhane v. Denisewich*, 689 A.2d 1062, 1064-65 (R.I. 1997)(citing *State Dep't of Envil. Mgmt. v. Dutra*, 401 A.2d 1288 (1978) (citations omitted)). PERA, as a civilian review board, is not "a law enforcement agency" and, therefore, the LEOBOR does not apply to any of its activities, including its procedural processes.

a. By its plain, ordinary terms, the LEOBOR only applies to investigations by a "law enforcement agency" and not to a civilian review board.

The requirements of LEOBOR with respect to the conduct of a *law enforcement agency* conducting an investigation of a law enforcement officer are set forth in R.I. Gen.

Laws § 42-28.6-2 (“Conduct of investigation”). As the plain language of the statute specifies, LEOBOR applies *only* to instances where an officer is “under investigation or subjected to interrogation by a law enforcement agency.” *Id* (emphasis added).

Specifically, § 42-28.6-2 of the Act provides:

Whenever a law enforcement officer is under investigation or subjected to interrogation by a law enforcement agency, for a non-criminal matter which could lead to disciplinary action, demotion, or dismissal, the investigation or interrogation shall be conducted under the following conditions (Emphasis added.)

In like fashion, literally every single section of the LEOBOR restates and confirms that the Act was intended to apply solely to investigations undertaken by a “law enforcement agency.”³

The principles by which this statute must be construed are oft-repeated and well-known to the Court. “When charged with the duty of statutory construction, one must read the language so as to effectuate the legislative intent behind its enactment.” *Gilbane Co. v. Poulas*, 576 A.2d 1195, 1196 (R.I. 1990). “In construing a statute, [a] court must give effect to all parts of the statute, if reasonably possible, in keeping with its declared

³ See, e.g., R.I. Gen Laws §§ 42-28.6-4 (“Right to hearing – Notice request for hearing – Selection of hearing committee”) (“the law enforcement agency shall give notice to the law enforcement officer”); § 42-28.6-5(d) (“Conduct of hearing”) (“the law enforcement officer shall provide to the charging law enforcement agency a list of all witnesses”); § 42-28.6-8 (“Witness fees”) (“Witness fees, mileage, and the actual expenses necessarily incurred in securing attendance of witnesses and their testimony shall be itemized, and shall be paid by the law enforcement agency if the officer is ultimately found innocent.”); § 42-28.6-6(c) (“Evidence at hearing – Hearing record”) (“All proceedings before the hearing committee shall be recorded by stenographic record, the expense of which shall be borne by the charging law enforcement agency”); § 42-28.6-11(c) (“Decisions of hearing committee”) (“In any proceeding under this chapter, it shall be the burden of the charging law enforcement agency to prove, by a fair preponderance of the evidence, that the law enforcement officer is guilty of the offense(s) or violation(s) of which he or she is accused.”) (emphases added).

purpose. Additionally, the words used must be given their ordinary and customary meaning unless a contrary intention appears on the face of the statute. If the language of a statute is plain and unambiguous and expresses a single, definite, and sensible meaning, that meaning is presumed to be the Legislature's intended meaning and the statute must be interpreted literally." *Rhode Island Chamber of Commerce v. Hackett*, 411 A.2d 300, 303 (R.I.1980).

Here, the plain, ordinary and customary meaning of the words chosen by the Assembly compel the conclusion that the LEOBOR was not intended to apply to civilian review panels or to any other investigative body or process not instituted by a "law enforcement agency." The language of LEOBOR's enabling statute is plain, unambiguous and expresses a single, definite and sensible meaning: the constraints of the LEOBOR shall apply: "[w]henever a law enforcement officer is under investigation or subjected to interrogation by a law enforcement agency...." R.I. Gen. Laws § 42-28.6-2 (emphasis added). The Court should presume the Assembly intended these words to be given their plain, literal and common meaning. Hence PERA, as a civilian review body acting independent from any law enforcement agency, is simply not subject to the procedural and substantive constraints of the LEOBOR.

Had the General Assembly intended, as Plaintiffs allege, to make LEOBOR the exclusive avenue by which the conduct of police officers is to be assessed and evaluated by *any* person or entity, even by civilian authorities, the Assembly could have clearly expressed such intent by eliminating the "law enforcement agency" limitation. The fact that the Assembly repeatedly and consistently limited the scope of the LEOBOR to investigations and proceedings of law enforcement agencies compels the conclusion the

Plaintiffs misapprehend the reach of the Act. For this reason alone, the Court should deny Plaintiffs request for declaratory relief.

- b. The Rhode Island Supreme Court has held that civilian municipal review of police activities does not fall within the ambit of LEOBOR.

The Rhode Island Supreme Court has already addressed the precise question presented by this Complaint: whether the LEOBOR applies to a municipal civilian investigation of police misconduct. *City of East Providence v. McLaughlin*, 593 A.2d 1345 (R.I. 1991). The court specifically held that it does not. *Id.*

In *McLaughlin*, the investigation into an officer's alleged misconduct began in March 1989 when the East Providence Minority Political Caucus informed the city council of alleged racial remarks made by an officer and requested that the council investigate the matter. Thereafter, the City's affirmative-action officer, Onna Williams, conducted a preliminary investigation into the allegations. *Id.*

In September 1989, the affirmative-action officer filed a report with the city manager, which report stated that "the evidence shows an overwhelming preponderance of offensive behavior that is continuous and flourishing." Overall, her report, based upon extensive investigation, concluded that the officer had displayed conduct unbecoming an officer on numerous occasions and recommended that he be terminated. *Id.*

After the city's personnel director concurred with her findings, Ms. Williams then submitted a formal complaint to the city's police department, citing the numerous occurrences set forth in her report. The acting chief of police commenced an internal investigation and, eventually, a hearing was held in accordance with the LEOBOR. *Id.*

In determining whether the affirmative-action officer's actions violated the officer's rights under the LEOBOR, the Rhode Island Supreme Court explained:

[W]e note the [hearing] committee's conclusion that the city failed to handle the matter as prescribed by the Law Enforcement Officers' Bill of Rights. Specifically, the committee stated that "the matter should have been investigated in-house by a member of the East Providence Police Department and from day one, the accused . . . should have been advised that he was under investigation."

We find, as the committee did, that the matter was handled appropriately from the time of [the chief's] investigation. Prior to that time Onna Williams' investigation was conducted merely to explore the need for an official investigation. *As a preliminary proceeding not resulting directly in disciplinary action, Williams' investigation did not have to meet the requirements of the Law Enforcement Officers' Bill of Rights.* Rather her investigation laid the groundwork for her swearing out a formal complaint, which led to the official investigation. Therefore, we find that the city did not violate the statutory guidelines prior to [the chief's] official involvement. The committee erred in concluding otherwise. *Id.* (emphasis added).

Consistent with its holding in *McLaughlin*, the Rhode Island Supreme Court has subsequently explained:

On several occasions this court has noted that if a *departmental investigation* of a police officer's conduct *could* result in the imposition of a disciplinary action, such as a demotion, transfer, dismissal, loss of pay, or similar action, to a permanently employed law enforcement officer, such officer is entitled to a hearing on any charge arising from the investigation before a "hearing committee" composed of three active Rhode Island law enforcement officers. *Zincone v. Mancuso*, 523 A.2d 1222, 1224 (emphasis added).

II. As the end result of the PERA process is a mere recommendation that the Chief of Police is free to embrace or reject, PERA does not "result in disciplinary action."

Like the first issue addressed above (PERA's status as a civilian, not a law enforcement agency) the Plaintiffs ignore the plain language of the Ordinance which explicitly provides that the final outcome of the PERA process is a *recommendation* to the Chief of Police. Ordinance § 18½-2(s). The Plaintiffs repeat selective quotes from

the Ordinance in a vain attempt to convince the Court the otherwise. Plaintiffs' Memorandum, pp. 1, 5, 16, 17, 18, 19. Yet repetition by counsel cannot alter the codified language of the Ordinance, which plainly states that, if the PERA hearing panel determines the evidence supports the complaint, it shall submit "a recommendation of discipline" to the Chief of Police.

To eliminate any uncertainty on the precise language set forth in subsection (s) of the Ordinance, it is reprinted below in full:

(s) *Findings of fact and determination.* Within thirty (30) days of the completion of an evidentiary hearing, the hearing panel shall issue a written report containing findings of fact; a determination of whether or not the complaint has been sustained by a preponderance of the evidence; if applicable, the level of violation described in the disciplinary matrix developed by PERA and the chief of police; and a *recommendation* of discipline. When a complaint is sustained, the findings of fact and the determination shall be submitted to the chief of police. The chief shall impose discipline based upon the level of violation as found in the disciplinary matrix to be promulgated by the authority in accordance with subsection (e)(1). The chief of police shall also provide the authority, the city council, and the mayor with a *written explanation of the reason(s) for his/her disciplinary decision.* The hearing panel report and the police chief's explanation for his/her decision shall be available to the public provided that the name of the complainant and/or respondent shall be kept [sic]. (Emphasis added.) Ord. §18½-2(s).

The same rules of statutory construction apply to municipal ordinances. *Mongony v. Bevilacqua*, 432 A.2d 661, 663 (R.I. 1981). The court is obliged to interpret a municipal ordinance as valid if possible. *Carlson v. Town of Smithfield*, 723 A.2d 1129, 1131 (R.I. 1999). Moreover, it is well settled that "Courts must construe statutes, not redraft them." *Estate of Eglee*, 383 A.2d 586, 588, 119 R.I. 786, 789 (1978). See also *Braman v. Wawaloam Reservation, Inc.*, 107 R.I. 270, 267 A.2d 410 (1970) ("in interpreting a statute [or ordinance], it will not be presumed that the [legislative body] intended to reach an unreasonable result or to have its legislation result in absurdities");

Kaya v. Partington, 681 A.2d 256, 261 (R.I. 1996) (“[t]his Court will not construe a statute to reach an absurd result”).

It has been said that “a golden rule of statutory interpretation [is] that, when one of several possible interpretations produces an unreasonable result, that is a reason for rejecting that interpretation in favor of another which would produce a reasonable result.”

^{2A} Norman J. Singer, *Statutes and Statutory Construction* § 45:12 at 81-82 (6th ed. 2000); *see also Dart Industries v. Clark*, 657 A.2d 1062, 1067 (R.I. 1995) (noting that courts will not interpret a statute so as to lead to an absurd result). A corollary of that principle is that whenever the language of an ordinance is susceptible of more than one interpretation, the Courts should adopt the interpretation that will preserve its validity and effectuate its evident purpose. *Nunes v. Town of Bristol*, 102 R.I. 729, 232 A.2d 775 (1967).

The Defendants concede there is arguably some tension within the Ordinance with respect to the discretion of the Police Chief to accept or decline the recommendation from the PERA hearing panel, specifically, within the four sentences, quoted verbatim above, relating to the Chief’s decision. The first sentence plainly states that the decision of the panel is a “recommendation” to the Chief. The second sentence simply provides that the panel’s determination shall be submitted to the Chief. The third sentence, upon which the Plaintiffs myopically focus, states that the Chief “shall impose discipline” based on the disciplinary matrix developed by PERA and the Chief. The fourth and final sentence requires the Chief of Police to provide PERA, the Mayor and the City Council “with a written explanation of the reason(s) for his/her disciplinary decision.”

In essence, the Plaintiffs urge the Court to overlook the first and fourth sentences, one of which clearly states and the other implies the Chief is *not* legally locked into implementing the hearing panel's decision. The Plaintiffs are asking the Court to focus solely on the "shall impose discipline" language in a single sentence. Clearly, that strained interpretation of the Ordinance would run afoul of multiple principles of statutory construction. Not only must the Court read the Ordinance as a whole and give effect to every section, sentence and phrase, but the Court must interpret the Ordinance so as to *preserve* its validity, not undermine its validity. *Nunes v. Town of Bristol*, 102 R.I. 729, 232 A.2d 775 (1967).

As the Ordinance clearly states, the outcome of PERA's investigation is a "recommendation of discipline". Ordinance §18½-2(s). Next, language that requires the Chief to provide, "a written explanation of the reason(s) for his/her disciplinary decision," further clarifies that the Chief retains full discretion as to accept or reject the decision, otherwise, why would the Council have insisted on a written explanation for his/her decision?

In fact, the Ordinance can reasonably be interpreted in a manner that both preserves its validity and gives effect to each sentence and section of the Ordinance. The Defendants urge the Court to hold that, consistent with the language of the Ordinance, the decision of PERA is simply a "recommendation" which the Chief is free to accept or reject. Further, if the Chief concurs with the recommendation, that is, that the evidence supports the finding, he has wide discretion under the disciplinary matrices with respect to the precise punishment he may impose. Clearly, however, the Council intended that, if

the Chief accepted the recommendation of a violation, the discipline he/she would impose would be drawn from the wide array of sanctions for each level of violation.

The Defendants urge the Court to find this constraint on the Chief of Police is does not contravene the LEOBOR for at least two reasons. First, the Ordinance requires, if not the Chief's approval, at least his consultation in the development of the matrix. Ordinance §18½-2(s) ("...developed by PERA and the chief of police"). Second, the matrix itself has an extremely broad range of sanctions or discipline for literally *every level of violation*. See Disciplinary Matrix, Plaintiffs' Appendix, pp. 8-14. Even for the so-called Category D violations – the most severe violation – the matrix permits a wide range of discipline, from nothing more than training or counseling to termination. Hence, the matrix itself does not unreasonably constrain the Chief's discretion.

Finally, in any case, the police officer involved would be free to pursue the full range of rights and privileges provided to him/her under the LEOBOR once the Chief makes a decision to pursue *any* discipline against the officer.

III. The civilian review process central to the PERA Ordinance is not preempted by LEOBOR.

- a. The General Assembly did not intend LEOBOR to be the sole and exclusive remedy in police misconduct matters.

Plaintiffs' preemption argument ignores the plain language of the LEOBOR that the scope and purpose of the act is to impart procedural and substantive limitations on all investigations and proceedings of a "a law enforcement agency." R.I.G.L. § 42-28.6-2; *see also* statutory citations in footnote 3. The Plaintiffs also misstate the plain language and evident intent of the "exclusive remedy" section upon which they so heavily rely. R.I.G.L. § 42-28.6-15. This section does *not* provide that LEOBOR shall be the

exclusive process by which the conduct of law enforcement officers may be investigated. Rather, it provides that LEOBOR shall be the exclusive remedy of the *for all law enforcement officers* with respect to all proceedings subject to the LEOBOR.⁴ As demonstrated above in Section I, the LEOBOR only applies to investigations and proceedings by a "law enforcement agency." In short, there is a significant difference between the statutory provision quoted, which places a *limitation* on the officers' remedies, and the assertion that this statement expresses the General Assembly's intent that LEOBOR thoroughly occupy the field of legislation regarding the review of police activities. Further, the Supreme Court of Rhode Island has already rejected this precise contention. *City of East Providence v. McLaughlin*, 593 A.2d 1345, 1351 (R.I. 1991).

In fact, PERA is not the first comprehensive arrangement for the civilian review of police activities in the City of Providence. The District of Rhode Island and, subsequently, the First Circuit Court of Appeals have already addressed the subject matter overlap between a municipal police review board intended to protect the rights of aggrieved citizens and the LEOBOR, finding that the two may be reconciled to co-exist. See *Coalition of Black Leadership v. Cianci*, 570 F.2d 12 (1st Cir. 1978). Defendants respectfully submit that PERA has been crafted so as to do just that, coexist with LEOBOR. The civilian review process may occur alone or in addition to the proceedings of the law enforcement agency.

1. Background: Coalition of Black Leadership vs. Cianci

In 1971, black residents of Providence filed a federal class action suit alleging various civil rights violations committed by members of the police department. After

⁴ The applicable language from R.I.G.L. § 42-28.6-15 provides: "The remedies contained herein shall be the sole and exclusive remedies *for all law enforcement officers subject to the provisions of this chapter*." (emphasis added).

trial of the matter, a consent decree entered on March 27, 1973, (the "Consent Decree"), providing a procedure through which a civilian complaint against an officer could be filed, investigated and resolved. *Coalition of Black Leadership* 570 F.2d at 13.

In relevant portions, the Consent Decree provided for the investigation of each civilian complaint by the Bureau of Personnel and, thereafter, preparation of a written report regarding the investigation and a hearing on each complaint where, "the investigating officer [from the Law Enforcement Agency] and any officers complained against shall attend." (Consent Decree at 3.) The hearing proceeded before a hearing officer who, ultimately, was empowered to make a finding of either "guilty" or "not guilty", which finding was transmitted to the Chief of Police, who was afforded discretion to either approve or reject the finding. (Consent Decree at 3-4.) If rejected, under the Consent Decree, the Chief could, in his/her discretion, submit charges against the officer in accordance with existing departmental disciplinary procedures. In any event, the Chief's action on the hearing decision was noted in the officer's personnel file and all parties were notified of the action. Pursuant to the Consent Decree, records of hearings held were to be maintained for two (2) years from the original hearing date and are available to the parties to the complaint or their representatives. (Consent Decree at 4.)

2. "Coalition I"

Approximately three years after implementation of the Consent Decree in 1973, the General Assembly enacted the Bill of Rights Act, prompting the Providence police officers to move for relief from the Consent Decree. See *Coalition of Black Leadership v. Cianci*, 570 F.2d 12 (1st Cir. 1978) ("Coalition I").

Coalition I arose after the City and the Fraternal Order of Police of the City of Providence moved for relief from judgment in the underlying discrimination action. *Id.* at 13. The District Court treated this action as a motion to vacate the Consent Decree, denied the motion, and ordered the parties to negotiate modifications to the decree to reconcile the rights afforded under the Bill of Rights Act with the plaintiffs' rights to be free from "racially discriminatory conduct." *Id.* at 13.

On appeal, the officers pressed, as one of its two arguments, that equity required the court to vacate the decree because of changes in the facts of the case due to LEOBOR's promulgation. *Id.* at 13-14. In support of this argument, the officers asserted that the procedures of LEOBOR would make the provisions of the consent decree unnecessary and, furthermore, that continued application of the decree would "result in unfairness since providence police officers would be subject to different regulations than would the police officers in other parts of Rhode Island." *Id.* at 14.

Ultimately, however, the First Circuit affirmed the District Court's ruling, rejecting both arguments. In so holding, the Court explained:

The consent decree at least in part was designed to protect the rights of those citizens who felt themselves to be aggrieved by unconstitutional police misconduct. The purpose of the new state legislation [the LEOBOR] was to protect police officers from any impairment of their rights when their conduct is questioned. While there is obvious subject matter overlap between the decree and the legislation, it is also obvious that neither was developed to meet these dual and partially inconsistent purposes.

Id. at 14.⁵

⁵ See also *Coalition of Black Leadership v. Cianci*, 480 F.Supp. 1340, 1341 (D.R.I. 1979) ("Coalition I") (denying officers' request to modify consent decree to require suspension of civilian complaint investigation where criminal charges arise out of the same incident).

Here, the situation with PERA requires the same conclusion. PERA flows directly from *Coalition I*. However, adopting the court's pronouncement that a civilian review procedure can co-exist with LEOBAR, PERA has been specifically crafted to do so while protecting the rights of aggrieved citizens. In contrast, LEOBOR is merely intended to protect rights of the officer(s) whose conduct is questioned *by the department* or who are under investigation *by the department*.

- b. Because the General Assembly did not adopt LEOBOR as the exclusive remedy for police misconduct, the City is free to enact PERA and PERA is not preempted.

The powers to the General Assembly with respect to home rule communities are set forth in § 4 of Article XIII:

Section 4. Powers of general assembly over cities and towns. - - The general assembly shall have the power to act in relation to the property, affairs and government of any city or town by general laws which shall apply alike to all cities and towns, but which shall not affect the form of government of any city or town. The general assembly shall also have the power to act in relation to the property, affairs and government of a particular city or town provided that such legislative action shall become effective only upon approval by a majority of the qualified electors of the said city or town voting at a general or special election, except that in the case of acts involving the imposition of a tax or the expenditure of money by a town the same shall provide for the submission thereof to those electors in said town qualified to vote upon a proposition to impose a tax or for the expenditure of money. R.I. Const. Art. XIII, § 4.

Meanwhile, the Rhode Island Constitution, Section 2 of Article XIII, provides:

Local legislative powers. - - Every city and town shall have the power at any time to adopt a charter, amend its charter, enact and amend local laws relating to its property, affairs and government not inconsistent with this constitution and laws enacted by the general assembly in conformity with

the powers reserved to the general assembly. R.I. Const.
Art. XIII, § 2.

The Rhode Island Supreme Court has held that “[a] local ordinance or regulation may be preempted in two ways. First, a municipal ordinance is preempted if it conflicts with a state statute on the same subject. . . . Second, a municipal ordinance is preempted if the Legislature intended that its statutory scheme completely occupy the field of regulation on a particular subject.” *Town of Warren v. Thornton-Whitehouse*, 740 A.2d 1255, 1261 (R.I. 1999). Field preemption prohibits municipal regulations in an area in which the General Assembly has implemented a comprehensive regulatory framework, thereby indicating its intention to reserve that area solely for state control. *Amico's Inc. v. Mattos*, 789 A.2d 899 (R.I. 2002). In *Amico's Inc.*, the court explained that:

The issue of preemption has appeared in case after case in which we have reviewed a municipality's authority under home rule. The dueling issues of local authority and state preeminence often intersect because home rule requires an analysis of whether the issue is of local or statewide concern, whereas preemption requires an analysis of whether the issue is implicitly reserved within the state's sole domain.

789 A.2d at 908.

Here, the first method of preemption described in *Thornton-Whitehouse* is not relevant because LEOBAR does not address “the same subject” as civilian review and, in any case, there is no conflict between the two. PERA was designed to protect the rights of those citizens who felt themselves to be aggrieved by unconstitutional police misconduct. On the other hand, the purpose of LEOBOR is to protect police officers from any impairment of their rights when their conduct is questioned by a law enforcement agency.

Second, the Assembly did *not* draft the LEOBOR in a manner to support a conclusion the Assembly intended to completely occupy the field relating to review of law enforcement conduct. Rather, the Assembly carefully and repeatedly limited the reach of the LEOBOR to investigations and proceedings by a law enforcement agency.

Finally, the Supreme Court has already rejected any conclusion that the LEOBOR preempts a civilian review process. *City of East Providence v. McLaughlin*, 593 A.2d 1345, 1351 (R.I. 1991). There, the Court expressly sanctioned a non-law enforcement agency investigation and determination as a preliminary proceeding to the officer's full rights under the LEOBOR.

IV. PERA does not violate the Providence Home Rule Charter's allocation of duties to the Chief of Police.

Finally, the Plaintiffs argue that the PERA Ordinance impermissibly limits the Police Chief's authority under the Providence Home Rule Charter. Specifically, Plaintiffs contend that the Chief's authority to discipline officers is limited by the language in § 18½-2(s) of the Ordinance which, as quoted verbatim above, purports to restrict the Chief's discretion to the range of sanctions set forth in the disciplinary matrix, *if* the Chief concurs with the recommendation. This contention misses the mark for at least three reasons.

First, the Plaintiffs' entire argument is premised on Section 1001(a) of the Home Rule Charter which defines the powers of the Commissioner of Public Safety. See Plaintiffs' Memorandum p. 19. The opening sentence of the Plaintiffs' Memorandum on this point (page 19) falsely equates the Commissioner of Public Safety and the Chief of Police. In fact, the two are *not* one and the same. The Commissioner of Public Safety is

appointed by the Mayor and has overall responsibility for three departments, including the police department.⁶

Second, there is no inconsistency between the Charter and the PERA Ordinance. The Charter simply provides the Commissioner shall be responsible “for the administration and discipline of the police department.” Home Rule Charter, §1001(a)(1). Even if the Court concludes that the PERA Ordinance limits in some manner the authority of the Police Chief, such an ordinance would not, in any way, contravene the provisions of the Charter. There are countless ordinances which define, specify, mandate and restrict the functions of department directors, all of whom have defined responsibility in certain areas of city government in the City Charter. The fact that the Commissioner of Public Safety has ultimate authority over police discipline does not negate the authority of the City Council to legislate with respect to that function. To the contrary, the Charter expressly authorizes the City Council to enact such ordinances as it deems necessary to “implement” the Charter. Home Rule Charter, § 1403. To further cement the point, the Charter directs the Commissioner of Public Safety with the responsibility for the enforcement of all laws and “ordinances” relative to the police department. Providence Home Rule Charter, Art. X. § 1001(a)(2). This mandate includes the PERA Ordinance.

Third, even if the Court concludes that the ordinance does restrict the authority of the Police Chief with respect to the range of sanctions to be imposed, assuming he concurs with the finding of fault, such restrictions are, at best, minimal. Not only is the Police Chief involved in the development of the matrix but, as noted above, the matrix

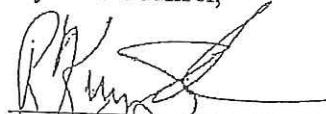
⁶ Although previous mayors have always appointed Commissioners of Public Safety, Mayor Cicilline has not filled the position and has announced that he will serve as his own Commissioner of Public Safety.

itself has an extremely broad range of sanctions or discipline for literally *every level of violation*. See Disciplinary Matrix, Plaintiffs' Appendix, pp. 8-14. Hence, the matrix itself does not unreasonably constrain the Chief's discretion – and the City Council has legal authority under the Charter to legislate such constraints.

CONCLUSION

For reasons stated herein, Defendants urge the Court to deny and dismiss the Plaintiffs' prayer for declaratory judgment and to sustain the PERA Ordinance as a valid, constitutional and enforceable ordinance of the City of Providence.

Defendants,
PROVIDENCE EXTERNAL REVIEW
AUTHORITY; THE CITY OF
PROVIDENCE; and DAVID N.
CICILLINE, in his capacity as Mayor of the
City of Providence
By their Counsel,



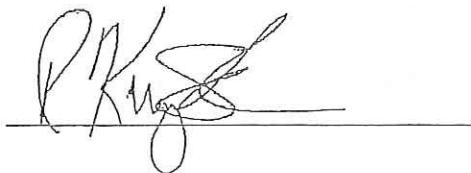
R. Kelly Sheridan (#1976)
Jason C. Preelphs (#6727)
Roberts, Carroll, Feldstein & Peirce
10 Weybosset Street
Providence, Rhode Island 02903
(401) 521-7000 (P)
(401) 521-1328 (F)

CERTIFICATION

I hereby certify that on the 18th day of October, 2006, a true and accurate copy of the within was mailed, postage prepaid, to:

Joseph J. Rodio, Esq.
Rodio & Ursillo, Ltd.
86 Weybosset St.
Providence, RI 02903

Lauren E. Jones.
Jones Associates
72 South Main Street
Providence, RI 02903-2907

A handwritten signature in black ink, appearing to read "P. K. Jones". It is written in a cursive style with a horizontal line underneath it.

STATE OF RHODE ISLAND
PROVIDENCE, SC.

SUPERIOR COURT

PROVIDENCE LODGE NO. 3,
FRATERNAL ORDER OF POLICE;
KEITH LAFAZIA; and
JOSEPH SARRASIN

C.A. No. PC 06-4859

vs.

PROVIDENCE EXTERNAL REVIEW
AUTHORITY; THE CITY OF PROVIDENCE;
and DAVID N. CICILLINE, in his capacity
as Mayor of the City of Providence

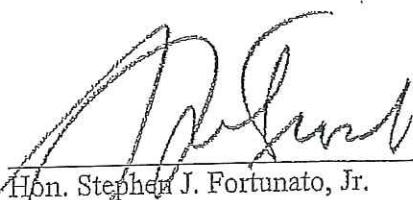
DECLARATORY JUDGMENT

Final JUDGMENT is hereby entered in the above-captioned matter as follows:

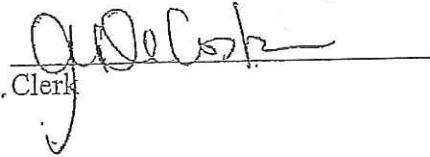
1. The Court denies the Plaintiffs' Complaint to invalidate in its entirety Section 18½-2 of the Providence Code of Ordinances (the "PERA Ordinance").
2. As provided in the PERA ordinance, the Providence External Review Authority may conduct investigations and hearings of alleged police misconduct and, if the Authority concludes such charges are sustained, the Authority may make such recommendation as it deems appropriate, consistent with the PERA ordinance and disciplinary matrix, to the Chief of Police with respect to the resolution or disposition thereof.
3. The PERA Ordinance shall not be construed or interpreted as authorizing the Providence External Review Authority to impose discipline directly on any law enforcement officer under any circumstances.
4. The PERA Ordinance shall not be construed or interpreted as authorizing or requiring the Chief of Police of the City of Providence to impose discipline without affording

the law enforcement officer the full protections of the Law Enforcement Officers' Bill of Rights Act.

Submitted By,
R. Kelly Sheridan #1976
Attorney for Petitioners
Roberts, Carroll, Feldstein & Peirce, Inc.
Ten Weybosset Street
Providence, RI 02903
521-7000; Fax 521-1328


Hon. Stephen J. Fortunato, Jr.

Dated: Nov 15, 2006


Clerk

Dep

At Providence, Rhode Island this _____ day of _____, 2006.

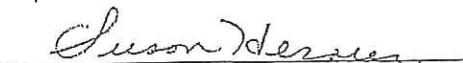
CERTIFICATION

I hereby certify that on November ^{15th}, 2006, I mailed a true copy of the within to the following:

Joseph J. Rodio, Esq.
Rodio & Ursillo, Ltd.
86 Weybosset St.
Providence, RI 02903

Lauren E. Jones, Esq.
Jones Associates
72 South Main Street
Providence, RI 02903-2907

Maxford Foster, Esq.
Assistant City Solicitor
Department of Law
275 Westminster Street, Suite 300
Providence, RI 02903



STATE OF RHODE ISLAND
PROVIDENCE, SC.

SUPERIOR COURT

PROVIDENCE LODGE NO. 3,
FRATERNAL ORDER OF POLICE;
KEITH LAFAZIA; and
JOSEPH SARRASIN

C.A. No. PC 06-4859

vs.

PROVIDENCE EXTERNAL REVIEW
AUTHORITY; THE CITY OF PROVIDENCE;
and DAVID N. CICILLINE, in his capacity
as Mayor of the City of Providence

ORDER REGARDING PLAINTIFFS'
COMPLAINT FOR DECLARATORY RELIEF

The above-captioned matter came on for hearing before Mr. Justice Fortunato on November 3, 2006 on the Plaintiffs' Complaint for Declaratory Relief. Prior to the hearing the parties had submitted memoranda and had agreed upon a record which was submitted to the Court at the hearing.

After hearing, and upon consideration of the record, the parties' arguments, and the memoranda submitted, for the reasons set forth in the Court's bench decision of November 3, 2006, the Court hereby

DECLARES:

1. The Court denies the Plaintiffs' Complaint to invalidate in its entirety Section 18½-2 of the Providence Code of Ordinances (the "PERA Ordinance").
2. As provided in the PERA ordinance, the Providence External Review Authority may conduct investigations and hearings of alleged police misconduct and, if the Authority concludes such charges are sustained, the Authority may make such recommendation as it

deems appropriate, consistent with the PERA ordinance and disciplinary matrix, to the Chief of Police with respect to the resolution or disposition thereof.

3. The PERA Ordinance shall not be construed or interpreted as authorizing the Providence External Review Authority to impose discipline directly on any law enforcement officer under any circumstances.

4. The PERA Ordinance shall not be construed or interpreted as authorizing or requiring the Chief of Police of the City of Providence to impose discipline without affording the law enforcement officer the full protections of the Law Enforcement Officers' Bill of

Rights Act.

ENTERED as an Order of this Court this 15th day of Nov , 2006, at

, Rhode Island.

By Order,

ENTER:

Hon. Stephen J. Fortunato, Jr.

[Signature]
By Clerk

A. DeCosta
11-15-06

Submitted By:

[Signature]
R. Kelly Sheridan #1976
Attorney for Defendants
Roberts, Carroll, Feldstein & Peirce, Inc.
Ten Weybosset Street
Providence, RI 02903
521-7000; Fax 521-1328

CERTIFICATION

I hereby certify that on November 15th, 2006, I mailed a true copy of the within to the following:

Joseph J. Rodio, Esq.
Rodio & Ursillo, Ltd.
86 Weybosset St.
Providence, RI 02903

Lauren E. Jones, Esq.
Jones Associates
72 South Main Street
Providence, RI 02903-2907

Maxford Foster, Esq.
Assistant City Solicitor
City of Providence
Department of Law
275 Westminster Street, Suite 300
Providence, RI 02903

Joe D. Henry



STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS
NOTICE OF APPEAL

SUPERIOR COURT

FAMILY COURT

DISTRICT COURT

PROVIDENCE

COUNTY/EXTRADITION

1. PROVIDENCE LODGE #3, FRATERNAL ORDER OF POLICE; KEITH LAFAZIA, AND JOSEPH SARRASIN	2. CASE NO.
VS. PROVIDENCE EXTERNAL REVIEW AUTHORITY, THE CITY OF PROVIDENCE, AND DAVID N. CICILLINE, IN HIS CAPACITY AS MAYOR OF PROVIDENCE	PC06-4859

3. Name of Each Plaintiff and Attorney <u>PROVIDENCE LODGE #3, FOP; KEITH LAFAZIA; AND JOSEPH SARRASIN (JOSEPH J. RODIO AND LAUREN E. JONES, ATTORNEYS)</u>	Name of Each Defendant and Attorney <u>PROVIDENCE EXTERNAL REVIEW AUTHORITY; CITY OF PROVIDENCE; AND DAVID N. CICILLINE (R. KELLY SHERIDAN AND JOSEPH M. FERNANDEZ, ATTORNEYS)</u>
9/15/06 Date Case First Filed in Lower Court/Agency	11/15/06 (SEE SEPARATE NOTICE) Date of Judgment/OrderAppealed From
PARTIES FILING APPEAL: <input checked="" type="checkbox"/> Plaintiff(s) <input type="checkbox"/> Petitioner(s) <input type="checkbox"/> Defendant(s) <input type="checkbox"/> Respondent(s)	Trial Court Judge: <u>FORTUNATO, J.</u>
	11/28/06 Date Appeal Filed
	Name of Each Party and Attorney Filing Appeal <u>PROV LODGE #3 FOP, LAFAZIA AND SARRASIN (LAUREN E. JONES AND JOSEPH J. RODIO, ATTORNEYS)</u>

4. TRIAL COURT ACTION APPEALED		
<input type="checkbox"/> IPR Preliminary Injunction <input type="checkbox"/> CON Conviction <input type="checkbox"/> IPT Permanent Injunction <input type="checkbox"/> CJD Default Judgment <input type="checkbox"/> CDS Dismissal/Jurisdiction <input type="checkbox"/> CDM Dismissal Merits <input type="checkbox"/> CTD New Trial Motion Denied <input type="checkbox"/> CTG New Trial Motion Granted	<input checked="" type="checkbox"/> CJJ Judgment/Judge <input type="checkbox"/> CDV Directed Verdict <input type="checkbox"/> CJU Judgment/Jury <input type="checkbox"/> DAL Alimony <input type="checkbox"/> PRO Probation Violation <input type="checkbox"/> PTM Pretrial Motion <input type="checkbox"/> FCJ Juvenile <input type="checkbox"/> PCR Grant Post Conviction	<input type="checkbox"/> DPC Denial Post Conviction <input type="checkbox"/> MTR Denial Sentence Reduction <input type="checkbox"/> DCF Dependency/Termination <input type="checkbox"/> DSJ Summary Judgment <input type="checkbox"/> ASF Agreed Statement of Facts <input type="checkbox"/> DRP Original Divorce Petition <input type="checkbox"/> CUS Custody
JUDGMENT FOR:	SENTENCES:	
<input type="checkbox"/> Plaintiff(s) <input checked="" type="checkbox"/> Defendant(s) <input type="checkbox"/> Other	<input type="checkbox"/> Confinement <input type="checkbox"/> Special Program <input type="checkbox"/> Fine/Restitution	<input type="checkbox"/> Suspended <input type="checkbox"/> Probation <input type="checkbox"/> Deferred
BAIL/RELEASE STATUS	Surety Bond Cash Bond	Held In Lieu Of Bail Other _____
5. TRANSCRIPT STATUS	Filing Fee Required: <input checked="" type="checkbox"/> Yes <input type="checkbox"/> No Trial Court Receipt No. _____ Appeal Filing Fee for Each Appellant or Petitioner: \$150.00 Court Reporter: _____	
Transcript Will Not Be Ordered Transcript Will Be Ordered Estimated Cost \$ _____		

11/28/06
DATE

LAUREN E. JONES
FILING ATTORNEY (Print)

2141
REG. NO.

[Signature]
SIGNATURE

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CLERK V. S. KIRK JR., CLERK

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BOSTON COURTHOUSE

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS
PROVIDENCE COUNTY SUPERIOR COURT

PROVIDENCE LODGE NO. 3,
FRATERNAL ORDER OF POLICE;
KEITH LAFAZIA; AND
JOSEPH SARRASIN

vs.

C.A. No. PC 06-4859

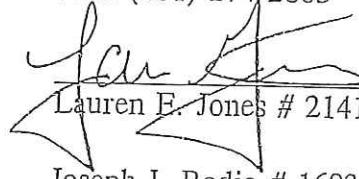
PROVIDENCE EXTERNAL REVIEW
AUTHORITY; THE CITY OF PROVIDENCE;
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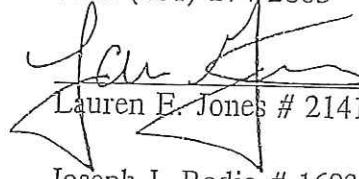
NOTICE OF APPEAL

Plaintiffs, Providence Lodge No. 3, Fraternal Order of Police, Keith LaFazia, and Joseph Sarrasin, hereby appeal to the Rhode Island Supreme Court from the Order Regarding Plaintiffs' Complaint for Declaratory Relief and the Declaratory Judgment, both of which entered on November 15, 2006.

By their attorneys,

JONES ASSOCIATES
72 South Main Street
Providence, RI 02903-2907
Tel: (401) 274-4446
Fax: (401) 274-2805


Lauren E. Jones # 2141


Joseph J. Rodio # 1693

Michael W. Murphy # 5402

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Providence RI 02903
Tel : (401) 331-6400
Fax: (401) 331-0436

CERTIFICATION

On 11/28/14 a true copy of the foregoing was served on all counsel of record,
listed below, by mail.

Leander M. C.

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R. Kelly Sheridan, Esq.
Jason C. Preciphs, Esq.
Roberts, Carroll, Feldstein & Peirce, Inc.
Ten Weybosset Street
Providence RI 02903



STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS
NOTICE OF APPEAL

1640

 SUPERIOR COURT FAMILY COURT DISTRICT COURT

PROVIDENCE

COUNTY/DIVISION

1. PROVIDENCE LODGE #3, FRATERNAL ORDER OF POLICE,
KEITH LAFAZIA, AND JOSEPH SARRASIN

2. CASE NO.

vs.
PROVIDENCE EXTERNAL REVIEW AUTHORITY, THE CITY OF PROVIDENCE,
AND DAVID N. CICILLINE, IN HIS CAPACITY AS MAYOR OF PROVIDENCE

PC06-4859

3. Name of Each Plaintiff and Attorney
PROVIDENCE LODGE #3, FOP; KEITH LAFAZIA; AND
JOSEPH SARRASIN (JOSEPH J. RODIO AND LAUREN
E. JONES, ATTORNEYS)Name of Each Defendant and Attorney
PROVIDENCE EXTERNAL REVIEW AUTHORITY; CITY OF
PROVIDENCE; AND DAVID N. CICILLINE (R. KELLY
SHERIDAN AND JOSEPH M. FERNANDEZ, ATTORNEYS)9/15/06
Date Case First Filed in Lower Court/Agency11/15/06 (SEE SEPARATE NOTICE)
Date of Judgment/Order Appealed From11/28/06
Date Appeal Filed

PARTIES FILING APPEAL:

 Plaintiff(s) Petitioner(s)

Trial Court Judge:

Name of Each Party and

 Defendant(s) Respondent(s)

FORTUNATO, J.

Attorney Filing Appeal
PROV LODGE #3 FOP, LAFAZIA
AND SARRASIN (LAUREN E. JONES
AND JOSEPH J. RODIO, ATTORNEYS)

4. TRIAL COURT ACTION APPEALED

- IPR Preliminary Injunction
- CON Conviction
- IPT Permanent Injunction
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- CDS Dismissal/Jurisdiction
- CDM Dismissal Merits
- CTD New Trial Motion Denied
- CTG New Trial Motion Granted

- CJJ Judgment/Judge
- CDV Directed Verdict
- CJU Judgment/Jury
- DAL Alimony
- PRO Probation Violation
- PTM Pretrial Motion
- FCJ Juvenile
- PCR Grant Post Conviction

- DPC Denial Post Conviction
- MTR Denial Sentence Reduction
- DCF Dependency/Termination
- DSJ Summary Judgment
- ASF Agreed Statement of Facts
- DRP Original Divorce Petition
- CUS Custody

JUDGMENT FOR:

- Plaintiff(s)
- Defendant(s)
- Other

SENTENCES:

- Confinement
- Special Program
- Fine/Restitution
- Suspended
- Probation
- Deferred

BAIL/RELEASE STATUS

- Personal Recognizance
- Held Without Bail

- Surety Bond
- Cash Bond
- Held In Lieu Of Bail
- Other _____

5. TRANSCRIPT STATUS

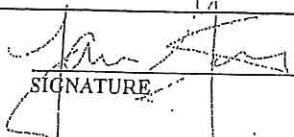
- Transcript Will Not Be Ordered
- Transcript Will Be Ordered

Estimated Cost \$ _____

Filing Fee Required: Yes No Trial Court Receipt No. _____

Appeal Filing Fee for Each Appellant or Petitioner: \$150.00

Court Reporter: _____

11/23/06
DATELAUREN E. JONES
FILING ATTORNEY (Print)2141
REG. NO.

 SIGNATURE

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS
PROVIDENCE COUNTY SUPERIOR COURT

PROVIDENCE LODGE NO. 3,
FRATERNAL ORDER OF POLICE;
KEITH LAFAZIA; AND
JOSEPH SARRASIN

vs.

C.A. No. PC 06-4859

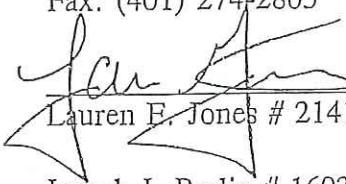
PROVIDENCE EXTERNAL REVIEW
AUTHORITY; THE CITY OF PROVIDENCE;
AND DAVID N. CICILLINE, IN HIS
CAPACITY AS MAYOR OF THE CITY OF
PROVIDENCE

NOTICE OF APPEAL

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By their attorneys,

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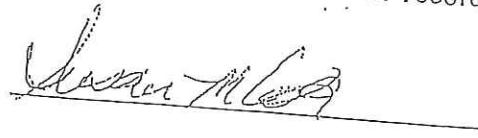

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86 Weybosset Street, #400
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CERTIFICATION

On 11/28/12 a true copy of the foregoing was served on all counsel of record,
listed below, by mail.



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City of Providence Department of Law
275 Westminster Street, Suite 200
Providence, RI 02903-1845

R. Kelly Sheridan, Esq.
Jason C. Preciphs, Esq.
Roberts, Carroll, Feldstein & Peirce, Inc.
Ten Weybosset Street
Providence RI 02903

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS
PROVIDENCE COUNTY SUPERIOR COURT

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KEITH LAFAZIA; AND
JOSEPH SARRASIN

vs.

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PROVIDENCE EXTERNAL REVIEW
AUTHORITY; THE CITY OF PROVIDENCE;
AND DAVID N. CICILLINE, IN HIS
CAPACITY AS MAYOR OF THE CITY OF
PROVIDENCE

MOTION FOR ORDER
STAYING PERA PROCEEDINGS PENDING APPEAL

Plaintiffs, Providence Lodge No. 3, Fraternal Order of Police [the FOP], Keith LaFazia, and Joseph Sarrasin, move pursuant to SUPER. CT. R. CIV. PRO. 62 and SUP. CT. R. APP. PRO. 7 and 8 for an order staying the on-going investigation and proceedings before the Providence External Review Authority [PERA], pending plaintiffs' appeal to the Rhode Island Supreme Court. Alternatively, if the Court is not inclined to stay the proceedings permanently during the appeal, plaintiffs move for a *stay pendente lite* while they pursue a stay on appeal from the Rhode Island Supreme Court.

The essential ground for this motion, outlined below, is that if the PERA proceeding is allowed to go forward, the appeals of the individual police officers challenging the validity of the PERA proceedings will be mooted — the procedural and substantive rights that the police officers seek to vindicate will be lost before the supreme court can render its own judgment on the novel issues presented by this litigation and the appeal. Under these circumstances, this Court should issue an order to maintain the status quo by holding PERA's actions in abeyance.

pending the outcome of the appeal.

The grounds for this motion, in greater detail, are the following:

1. Plaintiffs have appealed from the declaratory judgment entered on November 15, 2006, by which this Court upheld the PERA ordinance, Providence Code of Ordinances § 18½-2. A copy of plaintiffs' notice of appeal is attached to this motion. Appendix [A.] 1-3.¹
2. PERA's counsel has advised plaintiffs that

absent an order of the Court to the contrary, PERA will continue to seek to interview the two officers in question and such other officers against whom complaints have been or may be filed in the future. PERA also intends to proceed in due course with scheduling administrative hearings if and when the Authority makes the probable cause determination provided for in its administrative rules. Officers are likely to be subpoenaed, or at least invited, to attend such hearings. Should any officer refuse to attend an interview or an administrative hearing, PERA may include a finding of misconduct for non-cooperation in accordance with the ordinance and include that finding in its recommendation to the Chief.

Consistent with that expressed intention, the day after the judgment entered, PERA issued notices re-commencing the PERA hearing process and alerting the officers to the potential misconduct charge for their failure to cooperate. A.: 4-5.

3. The PERA ordinance and the procedures set forth in it for "external review" of civilian complaints against police officers are the first such formal procedure adopted by any city or town in Rhode Island. In this "test case" plaintiffs raised substantial issues of law, and issues of first impression, at that, concerning the validity of the PERA ordinance, including 1) whether the City unconstitutionally invaded the exclusive power of the General Assembly over the regulation of police affairs, 2) whether the City Council has the power under R.I. Const. Art. 13, § 2 to adopt PERA, and 3) whether PERA is preempted by the Law Enforcement Officers' Bill of Rights. R.I. GEN. LAWS §§ 42-28.6-1 *et seq.* [LEOBOR].

1. Items in plaintiffs' appendix have been numbered in the lower right corner for ease of reference.

4. The only appellate court to rule on the third issue held that the Maryland LEOBOR preempted a local ordinance. *See Abbott v. Administrative Hearing Board, Prince George's County*, 366 A.2d 756, 759-60 (Md.Ct.Spec.App. 1975), cert. denied 280 Md. 727 (1977) ("Where provisions of a locally enacted law and a law enacted by the State Legislature [LEOBOR] are inconsistent, and, as here, irreconcilable, a conflict exists. The State law preempts the locally enacted law and is controlling."). The *Abbott* court was also presented with the argument that "even if there is no actual conflict, [LEOBOR] provides comprehensive procedures governing disciplinary actions involving all police officers in the State, and that therefore the Legislature has preempted this field by occupation." *Id.* While the *Abbott* court did not rule on this issue because of its finding of a conflict between statute and ordinance, the court found this argument to be "highly persuasive." *Id.* There exists, therefore, a likelihood that the Rhode Island Supreme Court will rule in favor of the police officers. *See Pezza v. Pezza*, 690 A.2d 345, 348 (R.I. 1997) ("[W]hen an issue of first impression is presented to us, we generally look to other jurisdictions for guidance.")
5. In challenging the validity of the PERA ordinance, plaintiffs asserted, among other things, that the procedure set forth in the ordinance conflicts with LEOBOR. LEOBOR outlines a procedure that plaintiffs contend is the sole and exclusive procedure applying to police officers under investigation for misconduct. PERA's procedure conflicts with LEOBOR's procedure (a point PERA did not dispute to date), in that PERA conducts a full, public investigation using civilians as investigators, the police officer subject to the complaint is required to comply with the investigation or suffer further charges of misconduct, and the public investigation can lead to a full public hearing before a board mostly made up of civilians.

6. The supreme court has noted that "irreparable injury occurs where a later determination would be an 'empty victory.'" *Fund for Community Progress v. United Way of Southeastern New England*, 695 A.2d 517, 523 (R.I. 1997), citing *In re State Employees' Unions*, 587 A.2d 919, 926 (R.I. 1991) (Appendix A). Here, without a stay of the PERA procedure pending appeal, the police officers will most likely incur such irreparable harm. It will do them little good to be vindicated on appeal if they have already been compelled, in order to avoid the risk of additional misconduct charges, to participate in a procedure the supreme court ultimately deems invalid.

7. When considering a stay motion our courts often look to the federal courts' application of its (identical) Rule 62:

A stay will not be issued at the federal appellate level unless the party seeking the stay makes a 'strong showing' that (1) it will prevail on the merits of its appeal; (2) it will suffer irreparable harm if the stay is not granted; (3) no substantial harm will come to other interested parties; and (4) a stay will not harm the public interest.

Narragansett Electric Co. v. Harsch, 367 A.2d 195, 197 (R.I. 1976). Beyond that, our supreme court has recognized that the *Harsch* standards are not the be-all and end-all, and that there are circumstances in which "the trial justice's sound discretion should require that matters be held in status quo pending review * * *." *Rhode Island Department of Corrections v. Rhode Island State Labor Relations Bd.*, 658 A.2d 509, 510 (R.I. 1995). Here, a stay should be granted because all standards for a stay are met and if a stay is not granted maintaining the status quo pending appeal the case will effectively be mooted, at least with respect to the individual police officers' procedural rights.

8. As noted, Rhode Island state courts will often look to the federal courts for guidance when ruling on a motion for a stay. See e.g. *Hornoff v. City of Warwick Police Department*, No.

PC 03-4264, 2004 WL 877574, at **1 (P.C.S.C. March 23, 2004) (where trial court relied upon federal law for guidance when ruling on a motion to stay). Federal courts in this situation have granted a stay precisely because of the uncertainty presented by an issue of first impression. In making this determination, courts have *not* weighed the four stay elements individually, but rather, together:

We find that a more reasonable approach to this issue is to balance all of the equities involved in the case together. [Citations omitted.] Such an approach means that the necessary degree of probability of success on the merits of the appeal will vary from case to case and "will vary according to the court's assessment of other factors." [Citation omitted.] If the other three factors strongly favor interim relief, then a court may exercise its discretion to reach an equitable resolution by granting a stay if the petitioner has presented a serious legal question that raises a "fair ground for litigation and thus for more deliberative investigation." [Citation omitted.] Such an approach accords with the general trend in other jurisdictions away from a literal mathematical "probability" requirement. [Citations omitted.]

Turning now to an application of those standards to the present case, we conclude that [the movant] has raised a serious legal question and that the hardship factors weigh heavily in favor of maintaining the status quo.

* * * * *

In its response to the motion for stay, the Commission does not dispute [the movant's] contention that the issue raises on appeal regarding the proper construction of 4 Del. C. § 561(b) is an issue of first impression. Moreover, the Commission concedes that this Court has not considered previously the "repeated and continuous" standard of Section 561(b). Thus, we conclude that [the movant's] appeal presents a substantial question that is "a fair ground for litigation and . . . more deliberative investigation."

Kirpat, Inc. v. Delaware Alcoholic Beverage Control Commission, 741 A.2d 356, 358 (Del. 1998) (emphasis added). This ruling is in accord with federal court decisions granting stays under FED. R. CIV. P. 62 when an issue of first impression was present. *See Walsh v. Walsh*, 221 F.3d 204, 212 (1st Cir. 2000) ("In light of the many issues of first impression posed by this case, the district court stayed execution of its order pending appeal."); *Pearce*

v. E.F. Hutton Groups, Inc., 828 F.2d 826, 829 (D.C.App.Ct. 1987) ("[T]he District Court granted Hutton Group's motion for a stay pending appeal * * * [when it] found Hutton Group's arguments that Pearce's claims were subject to arbitration raised 'issues * * * of first impression,' and that Hutton Group would suffer substantial harm if Pearce's action were not stayed pending appeal and the District Court was later reversed."); *Washington Metropolitan Area Transit Commission v. Holiday Tours, Inc.*, 559 F.2d 841, 844 (D.C.Cir. 1977) ("[T]ribunals may properly stay their own orders when they have ruled on an admittedly difficult legal question and when the equities of the case suggest that the status quo should be maintained); *United States v. Fourteen Various Firearms*, 897 F.Supp. 271 (E.D.Vir. 1995) ("The issue on appeal in this case is one of first impression in this circuit. This factor weighs in favor of granting a stay because clear precedent from the Court of Appeals does not dictate the outcome of the substantive issue decided by this court and presented by the appeal.").

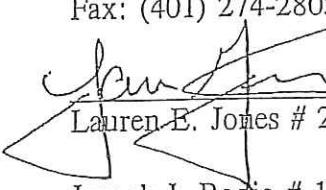
9. No substantial harm will come to the other interested parties — PERA and the City — because if PERA and the City prevail on appeal the only "harm" will have been a delay in the PERA proceedings. The PERA ordinance was first adopted in 2002 and it was not until 2005 that PERA was finally up and running, leading to this case in the middle of 2006. To date the City and PERA have not shown any strong need to move forward with great speed. Allowing this "test case" to play out will not harm PERA generally or with respect to the individual case that triggered this litigation. The public interest will also not be harmed for the same reason — the appeal of this issue would only temporarily delay PERA proceedings if the City and PERA prevail on appeal.
10. Because the PERA ordinance is the first one of its kind in Rhode Island, certainly since the enactment of LEOBOR, this case presents an issue of first impression. Likewise, in the

event that this Court's judgment is reversed, without a stay, the plaintiff police officers' statutorily-guaranteed substantive and procedural rights under LEOBOR will be compromised. As shown, this amounts to irreparable harm for the officers. Additionally, delay in the PERA proceedings will harm neither the other party nor the public interest. Plaintiffs respectfully submit that this Court should grant a stay pending appeal because Rhode Island law on the key issue in this case is unsettled. The likelihood of one party or the other prevailing on this key issue is simply unknowable. The status quo should therefore be maintained to permit the Rhode Island Supreme Court's ultimate ruling on this issue to be given effect.

For the above-stated reasons, plaintiffs request this Court to issue an order to maintain the status quo by holding PERA's actions in abeyance pending the outcome of the appeal. Alternatively, plaintiffs request that this Court issue a short-term stay *pendente lite* to provide plaintiffs with a period of time within which to seek and secure a stay pending appeal from the Rhode Island Supreme Court.

By their attorneys,

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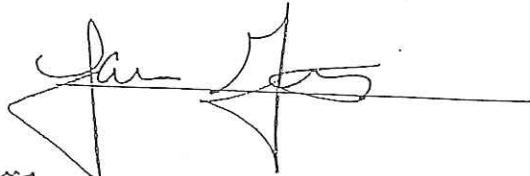

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CERTIFICATION

On 12/6/66 a true copy of the foregoing was served on counsel of record, and others,
listed below, by See below.



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STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS
NOTICE OF APPEAL

SUPERIOR COURT

FAMILY COURT

DISTRICT COURT

PROVIDENCE

COUNTY/DIVISION

1. PROVIDENCE LODGE #3, FRATERNAL ORDER OF POLICE, KEITH LAFAZIA, AND JOSEPH SARRASIN	2. CASE NO.
VS. PROVIDENCE EXTERNAL REVIEW AUTHORITY, THE CITY OF PROVIDENCE, AND DAVID N. CICILLINE, IN HIS CAPACITY AS MAYOR OF PROVIDENCE	PC06-4859

3. Name of Each Plaintiff and Attorney <u>PROVIDENCE LODGE #3, FOP; KEITH LAFAZIA; AND JOSEPH SARRASIN (JOSEPH J. RODIO AND LAUREN E. JONES, ATTORNEYS)</u>	Name of Each Defendant and Attorney <u>PROVIDENCE EXTERNAL REVIEW AUTHORITY; CITY OF PROVIDENCE; AND DAVID N. CICILLINE (R. KELLY SHERIDAN AND JOSEPH M. FERNANDEZ, ATTORNEYS)</u>	
9/15/06 Date Case First Filed in Lower Court/Agency	11/15/06 (SEE SEPARATE NOTICE) Date of Judgment/Order Appealed From	11/28/06 Date Appeal Filed
PARTIES FILING APPEAL: <input checked="" type="checkbox"/> Plaintiff(s) <input type="checkbox"/> Petitioner(s) <input type="checkbox"/> Defendant(s) <input type="checkbox"/> Respondent(s)	Trial Court Judge: <u>FORTUNATO, J.</u>	Name of Each Party and Attorney Filing Appeal <u>PROV LODGE #3 FOP, LAFAZIA AND SARRASIN (LAUREN E. JONES AND JOSEPH J. RODIO, ATTORNEYS)</u>

4. TRIAL COURT ACTION APPEALED

- | | | |
|---|--|--|
| <input type="checkbox"/> IPR Preliminary Injunction | <input checked="" type="checkbox"/> CJJ Judgment/Judge | <input type="checkbox"/> DPC Denial Post Conviction |
| <input type="checkbox"/> CON Conviction | <input type="checkbox"/> CDV Directed Verdict | <input type="checkbox"/> MTR Denial Sentence Reduction |
| <input type="checkbox"/> IPT Permanent Injunction | <input type="checkbox"/> CJU Judgment/Jury | <input type="checkbox"/> DCF Dependency/Termination |
| <input type="checkbox"/> CJD Default Judgment | <input type="checkbox"/> DAL Alimony | <input type="checkbox"/> DSJ Summary Judgment |
| <input type="checkbox"/> CDS Dismissal/Jurisdiction | <input type="checkbox"/> PRO Probation Violation | <input type="checkbox"/> ASF Agreed Statement of Facts |
| <input type="checkbox"/> CDM Dismissal Merits | <input type="checkbox"/> PTM Pretrial Motion | <input type="checkbox"/> DRP Original Divorce Petition |
| <input type="checkbox"/> CTD New Trial Motion Denied | <input type="checkbox"/> FCJ Juvenile | <input type="checkbox"/> CUS Custody |
| <input type="checkbox"/> CTG New Trial Motion Granted | <input type="checkbox"/> PCR Grant Post Conviction | |

JUDGMENT FOR:

- | | | |
|--|---|------------------------------------|
| <input type="checkbox"/> Plaintiff(s) | <input type="checkbox"/> Confinement | <input type="checkbox"/> Suspended |
| <input checked="" type="checkbox"/> Defendant(s) | <input type="checkbox"/> Special Program | <input type="checkbox"/> Probation |
| <input type="checkbox"/> Other | <input type="checkbox"/> Fine/Restitution | <input type="checkbox"/> Deferred |

BAIL/RELEASE STATUS

- | | | |
|--|--------------------------------------|---|
| <input type="checkbox"/> Personal Recognizance | <input type="checkbox"/> Surety Bond | <input type="checkbox"/> Held In Lieu Of Bail |
| <input type="checkbox"/> Held Without Bail | <input type="checkbox"/> Cash Bond | <input type="checkbox"/> Other _____ |

5. TRANSCRIPT STATUS

Transcript Will Not Be Ordered Filing Fee Required: Yes No Trial Court Receipt No. _____

Transcript Will Be Ordered Appeal Filing Fee for Each Appellant or Petitioner: \$150.00

Estimated Cost \$ _____

Court Reporter: _____

SUPERIOR COURT
FILED
MARY S. KINCH JR., CLERK
2006 NOV 28 P 3: U 1

SIGNATURE

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS
PROVIDENCE COUNTY SUPERIOR COURT

PROVIDENCE LODGE NO. 3,
FRATERNAL ORDER OF POLICE;
KEITH LAFAZIA; AND
JOSEPH SARRASIN

vs.

C.A. No. PC 06-4859

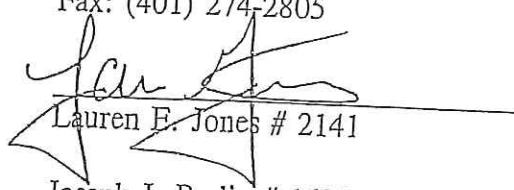
PROVIDENCE EXTERNAL REVIEW
AUTHORITY; THE CITY OF PROVIDENCE;
AND DAVID N. CICILLINE, IN HIS
CAPACITY AS MAYOR OF THE CITY OF
PROVIDENCE

NOTICE OF APPEAL

Plaintiffs, Providence Lodge No. 3, Fraternal Order of Police, Keith LaFazia, and Joseph Sarrasin, hereby appeal to the Rhode Island Supreme Court from the Order Regarding Plaintiffs' Complaint for Declaratory Relief and the Declaratory Judgment, both of which entered on November 15, 2006.

By their attorneys,

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CERTIFICATION

On 11/28/04, a true copy of the foregoing was served on all counsel of record, listed below, by Mail.



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STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS
PROVIDENCE COUNTY SUPERIOR COURT

PROVIDENCE LODGE NO. 3,
FRATERNAL ORDER OF POLICE;
KEITH LAFAZIA; AND
JOSEPH SARRASIN

vs.

C.A. No. PC 06-4859

PROVIDENCE EXTERNAL REVIEW
AUTHORITY; THE CITY OF PROVIDENCE;
AND DAVID N. CICILLINE, IN HIS
CAPACITY AS MAYOR OF THE CITY OF
PROVIDENCE

ORDER DENYING MOTION FOR STAY ON APPEAL

This matter came to be heard before Justice Fortunato on December 6, 2006, on plaintiffs' Motion for an Order Staying PERA Proceedings Pending Appeal. For the reasons set forth in the Court's bench decision of December 6, 2006, it is hereby

ORDERED:

1. Plaintiffs' motion for stay pending appeal is denied.

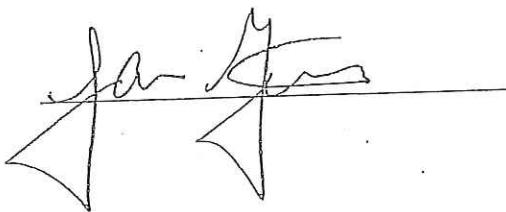
ENTER:

PER ORDER:

Order presented by
Lauren E. Jones # 2141
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Plaintiffs' attorney

CERTIFICATION

On 12/6/06 a true copy of the foregoing was served on counsel of record, and others, listed below, by See below.



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Providence, RI 02903-1845

12th ANNUAL NACOLE CONFERENCE
National Association For Civilian Oversight of Law Enforcement
Making Justice Visible
Monday, September 25th – Thursday 28th, 2006

AGENDA

Monday, September 25th, 2006

- 10:00 a.m. Registration
- 12:45 p.m. Pipes and Drums Fanfare
- 1:00 p.m. Session One - Plenary Session
Training Session I: David Harris: "The Place of Civilian Oversight in Preventive Policing"
- 2:30 p.m. Break/Refreshments
- 2:45 p.m. Session Two – Concurrent Session
Police/Youth Relations
- 2:45 p.m. Session Three – Concurrent Session
How to Make Policy Recommendations
- 6:00 p.m. Opening Reception: Basque Street Party

Tuesday, September 26th, 2006

- 8:30 a.m. Session Four – Concurrent Session
Service Quality Complaints: Diversion Methods for Rapid Resolution
- 8:30 a.m. Session Five – Concurrent Session
Training Session II: Ethics in Law Enforcement
- 10:00 a.m. Break/Refreshments
- 10:15 a.m. Session Six – Plenary Session
Featured Speaker: The Honorable B. Lynn Winmill, Chief Judge, U.S. District Court, District of Idaho: "Investigating Yourself, A Tale of Woe"
- 12:00 p.m. Keynote Luncheon: The Rule of Law in a Time of Terror
David Z. Nevin, Esq., Nevin Benjamin & McKay, LLP
- 2:15 p.m. Session Seven – Concurrent Session
Town Hall Meeting: Establishing Professional Standards for Oversight Professionals and Current Issues in Civilian Oversight
- 2:15 p.m. Session Eight – Concurrent Session
Database & Tracking Systems for Effective Oversight
- 3:45 p.m. Break/Refreshments

- 4:00 p.m. Session Nine – Concurrent Session
Training Session III: Autopsies & Other Medical Evidence in Use-of-Force Investigations
- 4:00 p.m. Session Ten – Concurrent Session
Training Session IV: Basic Skills for Conducting & Reviewing Oversight Investigations

Wednesday, September 27th, 2006

- 8:30 a.m. Session Eleven – Concurrent Session
Training Session V: Conducting Civilian Oversight Investigations:
Implementing/Evaluating the Investigation Plan & Interviewing Complaints
- 8:30 a.m. Session Twelve – Concurrent Session
Rampart: Lessons for Civilian Oversight Featuring Matt Lait and Scott Glover of the LA Times
- 10:00 am Break/Refreshments
- 10:15 a.m. Session Thirteen – Concurrent Session
Training Session VI: Conducting Civilian Oversight Investigations, Part II:
Case Studies
- 10:15 a.m. Session Fourteen – Concurrent Session
Oversight Behind Bars: Bringing Meaningful Review to Jails & Prisons
- 12:00 p.m. Break for Lunch
- 1:30 p.m. Session Fifteen – Plenary Session
Dr. Lorie Fridell: Policing Racial Bias: What Jurisdictions Can do to Promote Fair and Equitable Law Enforcement Practices
- 3:00 p.m. Break/Refreshments
- 3:15 p.m. NACOLE General Session and Election
- 6:30 p.m. Evening Reception: An Evening at the Anne Frank Human Rights Memorial and Idaho Historical Museum
(Sponsored by Boise State University and Hewlett-Packard Company)

Thursday, September 28th, 2006

- 8:30 a.m. Session Sixteen – Concurrent Session
Perspectives in Profiling (Simon Wiesenthal Center)
- 8:30 a.m. Session Seventeen – Concurrent Session
Less Lethal Use of Force, the Law Enforcement Dilemma
- 10:00 a.m. Break/Refreshments
- 10:15 a.m. Session Eighteen – Plenary Session
Closing Plenary Speaker: Michael R. Bromwich, Esq.

Conference Concludes

**Providence External Review Authority
NACOLE 12TH ANNUAL CONFERENCE
In BOISE, IDAHO
REPORT By PERA Staff**

Training Session One – Concurrent Session

“The Place of Civilian Oversight in Preventive Policing”

Panelist

David A. Harris: E.N. Balk Professor of Law and Values, University of Toledo, Toledo, Ohio

David A. Harris is the Eugene Balk Professor of Law and Values at the University of Toledo College of Law, and former Senior Justice Fellow at the Open Society Institute in New York. Professor Harris wrote a book called “Good Cops: The Case for Preventive Policing.” The book shows that police departments in the U.S. have begun to embrace a new approach to law enforcement, which Harris calls “preventive policing.” In a series of compelling stories from cities and towns around the nation, Harris shows how preventive policing has succeeded on the ground and has produced something that many thought impossible: police work that *both* reduces crime effectively, *and also* respects the civil rights and dignity of citizens. Harris has presented groundbreaking research to the U.S. Senate and other government bodies, and he also does police training around the U.S. Professor Harris has been described by American newspapers as “America’s leading authority on racial profiling,” and his 2002 book, titled “Profiles in Injustice: Why Racial Profiling Cannot Work,” marked a major turning point in the public debate on profiling in the U.S. His work has become the basis for laws enacted against racial profiling in states across the U.S.

This presentation attempted to broaden the focus of civilian oversight practitioners and those who study civilian oversight by showing how oversight fits into the broader ideas of preventive policing. This section showed how the various oversight strategies in use today fit naturally with several other central concepts in preventive policing.

David Harris stated that given the position and the power we give the police we must have civilian oversight. What's really at stake, nothing less than our democratic findings? The idea of prevention people in law enforcement etc., talk about preventive methods and bringing knowledge back to groups. There is a remarkable receptiveness to these ways of thinking.

The purpose of civilian oversight is preventive policing. Core idea at the center of David's book:

1. Building bridges – get people on both sides or divide by building bridges to create relationships.
2. Problem solving-idea of problem base policing instead of looking at each incident individually, view it as a whole. Instead of viewing as a discrete incident, question why is there continuous problems.
3. Accountability-internal/external: Internal-civilian oversight. External-account to its command staff.
4. Changes in leadership
5. Changing police culture-probably the most difficult ones to change. This has been a huge problem throughout the years.

These are the five key ideas:

1. Where does civilian oversight fit with preventive policing? All take cooperation, a degree of neutrality, and respect (respect from both sides).
2. David feels that we as oversight people are the ones that need to support these ideas in order for the oversight to be successful.
3. Varieties of civilian oversight by Sue Quinn. This is not to say that civilian oversight is an exact science. Quinn says there are many different forms of civilian oversight of police agencies, and no single model that fits every community. Each model has its strengths and weaknesses, evaluated in Quinn's "The Varieties of Oversight" on NACOLE's web-site, a clearinghouse for grassroots advocates. But, Quinn says, there are three basic mistakes to avoid:
 - (1) Failure to be adequately informed, educated and prepared
 - (2) Over-identification with the community, and
 - (3) Over-identification with the police.

There are other difficulties. The initial stage of gathering information and educating the public can be daunting, she says, and burnout is common. The process is long and often community members become frustrated and give up. Neutrality and independence, essential to the effectiveness of any oversight body, are also fragile. Cooperation by the police is not unusual. In addition, critics of civilian oversight have argued that many such boards do not have sufficient powers to conduct full, independent investigations and so are ineffective. Opponents ranging from left political activists to police officers have lodged this criticism, which advocates admit applies to some, but not all-civilian oversight.

Experts recommend two models of oversight to avoid such tooth-lessens:

- (1) Independent civilian review boards (as in Minneapolis and Iowa City) with subpoena powers;
- (2) The power and budget to hire an independent investigator if necessary, and independent auditors with similar powers (as in San Jose). The civilian review board model has the added benefit of involving people in the process, roughly analogous to the jury model for criminal trials.

Effectiveness is difficult to measure, say advocates. But in Iowa City, for example, witnesses who are reluctant to talk to police continue to come forward with testimony for the city's Police Citizens Review Board, now in its eighth year. The number of complaints has dropped significantly, board members believe police behavior has improved, and the community remains supportive. Advocates in other communities can still expect opposition, says Quinn, especially from law enforcement officials and their political supporters, but they should not assume that all police officers oppose them. Quinn, a retired probation officer, says people get involved in oversight for various reasons. Many of them are former employees of law enforcement or probation, who see the need for oversight firsthand. In fact, law enforcement officials who are supportive, or at least open-minded, can be invaluable in establishing civilian oversight. Still, as Walker has noted, civilian oversight is no panacea. The arduous tasks of education and organization—and what Quinn calls "respectful vigilance," modeling what communities expect from the police—is enough to keep activists busy for years at a time. But the problem of police misconduct is not going away. Where

- the movement goes from here is a good question, says Quinn, perhaps for activists at the upcoming Miami conference.
- 4. In order to be successful you need “not identified with community or police; respect toward both.”
- 5. Fair, firm, consistent dialogue over clearly defined issues.

Oversight Activists and Professionals:

- Have a broad vision
- You have the tools, the foresight, and the tenacity.
- You are ideally positioned to help your community to focus on prevention policing.

Example: Building bridges: Metro, Detroit in 1998-1999 issues was racial profiling. Daedre McGhee, one of Detroit's African American Leaders, decided that the time had come for minority community and the law enforcement to find common ground on the issue of racial profiling. McGhee then the associate director of the Detroit Branch of the National Conference for Community and Justice (NCCJ), a national nonprofit organization with a history of community building and advocating fairness in the justice system, saw an opportunity: the Detroit police department had a new chief, who had changed the leadership in many parts of the organization. Born in the non-profit community for many years. It was her feelings that it will always be some disagreement about her feelings.

ADVOCATES AND LEADERS FOR POLICE AND COMMUNITY TRUST (ALPACT): This group, based in metropolitan Detroit, organized itself to confront racial profiling in 1999. In 2001, it became the vehicle for law enforcement and the community to come together around issues arising from the attacks of September 11. ALPACT's story appears in Chapter 3 of Good Cops, called “Building Bridges.” This website, sponsored by the National Conference for Community and Justice, Michigan

Accountability:

Police accountability, where civilian oversight is involved. Accountability to the public, to the rule of law, and to the goal of fair, effective and constitutional law enforcement promises the best possible chance not just to control the behavior of individual officers but to create a police culture in which officers hold themselves and each other to a high standard of conduct and honesty. The challenge of police accountability is not how to ‘get’ a few bad officers but how to fix organizations. A single-minded focus on accountability gives us the best chance to achieve real organization change. Police has to be accountable to the citizens they serve (external) and to their compound structure, policies and mission (internal)

A world without Police Accountability:

- No accountability, no trust
- No trust, no intelligence (no information)
- “Us v them”, institutionalized
- Safety for citizens and officers is set back

The alternative is a loss of credibility and legitimacy incompatible with democracy. This is what happened in the debate over racial profiling by police on roads and highways in the United States. When a substantial number of people question whether police enforce the law fairly, they implicitly question the integrity of all police action.

Session Two-Concurrent Session

Police/Youth Relations: "Effective Strategies to bridge the Gap"

Panelists:

Karen Barbee: Member, Boise Youth/Police Relations Committee, Boise, Idaho

Kim Bogucki: Detective, Seattle Police Department, Seattle, Washington

Matt McCarter: Coordinator, Youth Services, Department of Parks and Recreation, Boise, Idaho

Moderator:

Pierce Murphy, Community Ombudsman, Boise, Idaho (a government official appointed to receive and investigate complaints made by individuals against abuses or impulsive, unpredictable acts of public officials; one that investigates reported complaints reports findings, and helps to achieve equitable settlements).

Civilian oversight agencies and boards have a responsibility to conduct community outreach activities and participate in efforts to resolve conflict, encourage open communication, and build trust between law enforcement agencies and the many diverse constituencies within their community. Flashpoints and conflict can be diverted or prevented when the police are encouraged to actively engage with disaffected populations, include youth. Panelist described their efforts to open and maintain an on-going dialogue between the police and the youth of their communities.

The current relationship between youth and police has been described as negative. Common problems in the relationship have included; a lack of trust, racial and cultural differences, little or no contact, except through police responding to crime-related incidents, and high levels of anger, fear, and hostility between the two groups.

The relationship has been described as one of natural adversaries. This hostile relationship discourages open communication between police and youth, which, in turn, further exacerbates the levels of distrust and fears felt by both youth and police officers. Without open communication chances for violence are increased. Officer and citizen safety are threatened, unnecessarily. Public order is also threatened by a negative relationship between police and youth. For example, police giving simple directions to youth to disperse can, without a positive relationship between the police and the youth, lead to violence, property destruction, arrests, court hearings and more.

The current relationship between police and urban youth can be dysfunctional and is directly related to increased levels of violence, physical injury to police officers, youth, and others, and contributes to disrupting public order.

The officers in this strategy to build a bridge between the youths and the law enforcement by doing role-playing and asking questions like:

- Name one thing you don't know about me.
- What will make our contact easier?

Being able to take this program in the community and helping the youths to utilize their skills is a form of building bridges and participation and in effort to resolve conflicts. Another program, known as Street SMART (Skills, Mastery and Resistance Training)-is also used in schools to teach kids about gangs. This 27-week curriculum teaches gang awareness and resistance, conflict resolution and positive influences.

Betsy Jenkins, who works with a parent advocacy group in Evanston, believes kids need more education. "There needs to be more outreach from the police department. Officer Friendly needs to be a little more friendly," she says.

When the general public thinks of gangs, it makes an automatic link to African-American and Latino youth. But in fact, many white kids are involved in gangs and many gangs today, especially those in the suburbs, are racially mixed. So why the misconceptions?

"It's the racist society we live in choosing to capitalize on people's fears," says Matthews of the Chicago Police Department. "Society at large chose to accept a small group and keep everyone else out," he says.

Detective Kim Bogucki has been a member of the Seattle Police Department for over 18 years. Her current responsibilities include working with 10 different demographic communities with an emphasis on newer immigrating communities. Detective Bogucki co-wrote the Donut Dialogue Program with a group of homeless and street involved youth. This program brought this community and the police together to discuss their perceptions, differences and ultimately made each side aware of some similarities. She has also co-written a Role Reversal program with a group of Seattle high school and middle school youths.

In addition she put together the "Life Choices and the Law" Teen Summit, a Summit for teens with 4 workshop:

- Role Reversal (above)
- The Law and You (an interactive video with scenarios and discussions)
- Decision Making (follows the S.O.D.A. concept (Stop, Options, Decide, Act))
- Street Smart (anti-gang valuing differences)

Detective Bogucki was awarded the 2001 Red Cross Heroes Award for her work with Homeless and Street-Involved Youth and Youth Adults and the 2003 Seattle Police Foundation Award for Excellence for the development and implementation of the Donut Dialogues program.

Matt McCarter who is currently a Coordinator with Boise Parks & Recreation Youth Services Unit. His background is in facilitation, leadership development and experiential education. He managed the Seattle Police Department volunteer program and served as a JustServe AmeriCorps Volunteer. He has merged his work with the youth program and the position with the Department of Parks and Recreation to set up a program to work with youths on a volunteer basis. He has taken the youths out of the streets and put them to work in the parks under a volunteer basis. They stay with the program until they come of age and offered to work in the

Parks under a permanent basis. This volunteer program with the youths in the park encourages other youths to participate and it takes them off the streets to help cleaning up the streets.

Karen Barbee is a Member of the Boise Youth/Police Relations Committee. Currently, she is involved in the C-72 service club, National Honor Society, and a member of the Youth/Police Task Force.

Session Three ran concurrent to session two

Session Four – Concurrent Session

Service Quality Complaints: “Diversion Methods for Rapid Resolution”

Panelist

Pierce Murphy: Community Ombudsman, Boise, Idaho

Michael Masterson: Chief, Boise Police Department, Boise, Idaho

Richard Rosenthal: Independent Monitor, Denver, Colorado

Leslie Stevens: Director, Independent Police Review Division, Portland, Oregon

John Tellis: Captain, Internal Affairs Division, Portland Police Bureau, Portland, Oregon

Moderator

Pierce Murphy: Community Ombudsman, Boise, Idaho

Police departments, civilian oversight agencies and boards report spending significant amounts of investigative and staff time documenting, investigating, and resolving complaints from individuals not satisfied with the service they received from a police officer. Often these complaints stem from poor communication or unrealistic expectations. Most do not involve corruption, brutality or other serious police misconduct. In this session, panelists from three different agencies will explain how their police and oversight agencies are working together to respond to service quality complaints. Among other things, session participants will learn about setting criteria for the diversion of cases, designing a system to maximize learning for both officers and complainants, and setting safeguards to ensure that true misconduct does not go undetected. As a result of attending the session, participants will be able to plan the establishment of service quality complaint diversion program for their own agency.

Michael Masterson is Chief of Police of Boise, Idaho. He leads Idaho's largest police department, in the state's Capitol City, with 350 employees, up to 288 of those sworn police officers. The Boise Police Department (BPD) is an organization that doesn't rest on its reputation as a high quality service and community oriented police department. BPD surveyed their residents on the quality of their service and they are always searching for best practices to demonstrate their commitment to continuous improvement.

Beginning in April 2005, the Boise City Ombudsman began forwarding certain citizen inquiries from citizens directly to a police captain. This new process was developed cooperatively between Boise Police and the Ombudsman and is referred to as Rapid Resolution Inquiries. The goal was to better serve citizens by putting them into direct contact with a police supervisor who could

quickly answer their questions or resolve their concerns. In 2005, the Ombudsman forwarded 58 of these inquiries to BPD. Both the Department and the Ombudsman find this process very successful for everyone involved. The process is credited with greatly reducing the time needed to resolve citizen inquiries, from 51 days in 2004 to 20 days in 2005. The Department is and will continue to be committed to not only providing quality, professional, and efficient law enforcement service to the citizens of Boise, but also objective, fair, concerns regarding the actions of officers.

Richard Rosenthal currently serves as the Independent Monitor for the City & County of Denver. The Office of Independent Monitor (OIM) began operations on August 1, 2005. The OIM monitors the Denver Police and Sheriff Department's handling of citizen complaints, internal criminal and administrative investigations, officer-involved shooting and in-custody death investigations. The Monitor makes recommendations regarding the imposition of discipline and conducts audits of issues of importance to the Departments and the community. The Monitor has limited jurisdiction over uses of deadly force by Fire Department Arson investigators.

Prior to June 2005, Richard Rosenthal was Director, Independent Police Review Division (IPR), City of Portland, Oregon, Auditor's Office. The IPR Director acts as an independent police auditor-monitor-ombudsman for the City of Portland, directly reporting to the elected City Auditor. Responsibilities included:

- taking all citizen complaints against members of the Portland Police Bureau, and reviewing and monitoring police internal investigations, findings and imposition of discipline;
- coordinating an annual audit of officer-involved shooting investigations, findings, policy and training;
- conducting specialty audits on an ongoing basis;
- facilitating the work of the Citizen Review Committee, handling appeals of findings resulting from internal affairs investigations and recommendations regarding case handling and Police Bureau policies.

Leslie Stevens is an attorney who has spent over ten years representing local governments. Her experience includes prosecuting criminal cases, handling and advising management on collective bargaining issues and labor grievances, providing legal advice to risk managers and police bureaus on policies and practices, as well as liability defense and civil rights litigation. She is currently the Director of the Independent Police Review Division in Portland, Oregon. Her office is responsible for handling or monitoring the Bureau's handling of all citizen complaints made against the Portland Police Bureau and for recommending changes to Bureau policies and procedures to promote higher standards of competency, efficiency and justice in the provision of police services. Stevens said she knows taking complaints about police officers can be a thankless job. "There'll always be those who don't think it's working and don't think it can be fair and impartial." She said her top priority is to improve relations between the city, police and citizens.

John Tellis is a 22-year veteran of the Portland Police Bureau and holds the rank of Captain. He is currently assigned to the Internal Affairs Division. During his tenure with the Police Bureau he has worked in the Operations Branch, Investigations Branch, and Services Branch. Additionally he has an extensive background in training and development.

Session Five ran concurrent to session four

Session Six – Concurrent Session

"Investigating Yourself, A Tale of Woe"

Panelist

Featured Speaker: The Honorable B. Lynn Winmill, Chief Judge, U.S. District Court, District of Idaho.

The discipline of Federal Judges is done by Federal Judges. They investigate themselves. The Constitution requires this system to preserve the independence of the Federal Judiciary. Consequently, they face the serious problems accompanying any self-policing system. Judge Winmill presently sits on the Judicial Council of the Ninth Circuit Court of Appeals, The main disciplinary body for Federal Judges in that Circuit. He has explained to us what happens in the absence of the type of independent oversight provided by NACOLE members.

Judge Winmill started his presentation by stating how he truly admired the work of the Civilian Review Board. He thought that it was really phenomenal responsibility. I have been thinking a lot about what it is we have in common. I can think of about two things:

- He thought our work to some extinct overlaps. He handles a lot of police misconduct claims, and the conduct in the context in section 1983 claims brought against police officers.
- However, I think more importantly and what is going to explain my discussion here today is that our interest overlap because I share with you an intense interest and the need for appropriate oversight of those charged with enforcing the laws of the United States.

Honorable Winmill explained his interest and need for oversight. He began by taking us on a journey to Hollywood. Have you ever wondered what the world would be like without you in it? What if you never lived? What would really matter when the world continue to turn on its axis? How will things change for your family, your friends and in your case, your community? What is the promise with the classic perfect movie, "It's a wonderful Life," starring Jimmy Stewart. It's one of his favorite movies of all times. He doesn't know how he lived so long without really watching the movie when he first saw it, watching it about 20 years ago. He doesn't think Christmas ever goes by now without him watching it at least a couple of times. Because he thinks the message is so phenomenal. The Jimmy Stewart character, George Bailey, was despondent in his life and had made no difference with everything that he wanted to do had not panned out the way he planned. And he was about to jump off a bridge. The angel named Clarence saved his life. Then Clarence, the angel, then proceeded to show George Bailey what life would have been like if he had never been born. The small town was such a wonderful place to live with him present was grim and dirty place in his absent. His brother, whose life he saved was of course dead. He had no one to pull him out of that freezing pond. His wife was a miserable spinster. Many persons who he had helped in his actual life were without such help in this alternative world and were leading hopeless lives that act in awful conditions. In short we discovered through the process in Clarence's journey back into this imaginary world that his life truly did matter. The world was a better place because he lived.

Judge Winmill then asked each of us to put ourselves in the shoes of George Bailey or Jimmy Stewart. He stated, today I am going to be your angel and show you a world that you do not exist. Where there are people like you who do your job, but not on the job doing what needs to

be done. And by this I hope to show you the great value of your work. This strange world that you do not exist is the very world that I live in. It is the world of being a Federal Judge. Now to really bring home my point I will put you in a very terrifying place in a Federal Court room. Wait, it gets worse. You are not seated in the back as a spectator, comfortable and padded seats, but instead you are at the defendant's table with a very high price attorney sitting beside you with the meter running. This means that you have been sued. But wait, it gets even worse. A large wealthy company is suing you with lawyers who are "pit bulls." This large company is known as "MACRO Corporation." But wait, it gets even worse. The judge, who is a Federal Judge, "Judge X", was appointed for life. He is not accountable to any boss or supervisor who could fire him. He is not accountable for any voters. Indeed it is unfair whether he is accountable to anyone. He can be removed only by impeachment. The same impeachment proceeding used to remove the President of the United States and he seems to scowl at you a lot. But wait, it gets worse. The attorney turns to you and says that he has heard four rumors about the judge that is presiding over your case.

Rumor #1: The Judge went "duck hunting" with the CEO of MACRO Corporation just a week before they sued you.

Rumor #2: The Judge purchase stock in the MACRO Corporation just a week before you were sued.

Rumor #3: The last meeting that the Judge attended, "The Judicial Seminar," at a very expensive resort, sponsored by MACRO Corporation who also paid all of his expenses.

Rumor #4: The judge has had numerous misconduct complaints filed against him for unethical behavior and has even been sanctioned a few times in the past.

All four rumors were all bad. I hope you can understand what a horrifying prospect being in court under those circumstances will be. So you direct your attorney to track down these rumors and to see if there is someway that you can get another judge. A week later, your attorney calls and this is his report.

Rumor #1: It is true. "Judge X" did go duck hunting with the CEO of MACRO Corporation before you were sued. But, the attorney says, it is nothing we can do. After all he related to the Supreme Court Justice Antone Scalia went duck hunting with Vice President Dick Cheney for the time when Cheney had a case pending before the Supreme Court and Scalia refuse to step down. So if Justice Scalia can get away with that surely your attorney can't ask "Judge X" to refuse himself.

Rumor #2: Your attorney cannot tell if "Judge X" own stock in MACRO Corporation. If he has just bought the shares he does not have to report them until the end of the year, and it would be months before that report will be filed and subject to public review, and once again your relates we have bad presence from the Supreme Court. During his confirmation hearing, the Supreme Court Justice Samuel Alito when he was a lower court judge sat on a case involving a company known as Vanguard, while he held Vanguard stock.

Rumor #3: Your attorney cannot find out who sponsored the Seminar. The sponsors are not disclosed. New rules have been passed just recently requiring disclosure those rules have not come into effect and are not retroactive.

Rumor #4: It may true. Both attorneys confirm that numerous misconduct complaints had been filed against “Judge X” and the Judicial Counsel may have sanctioned him. But it is not clear whether that had actually occurred. There is no public record of any of this. The decision sanctioning “Judge X” was all sealed, and unavailable to the public. And none of those decisions were published.

This is the scary world that you don’t exist, that I wanted to describe for you. Now I must say that I don’t know of any Federal Judge who would knowing preside over a case while owning stock in one of the parties. Now if he was absolutely clear that Justice Alito was not aware of that conflict when he actually presided over the case, because he was apparently aware of all of the stock holders. But the real issue here is public transparency. You should not have to rely entirely on the integrity of Judges. You should be able to check it out for yourself. All of these problems that I have mentioned, where Judges stock ownership in one of the parties has misconduct sanctions, an all expense paid functions should be a matter of public record.

Available for anyone to check out, but it is not:

- You should be able to easily determine if your Judge has been sanctioned for misconduct, but you can’t.
- You should be able to easily to determine if your Judge is traveling to lavish resorts on someone else’s nickel, but you can’t.
- You should be to easily to determine if your Judge have any financial interest in any party to your case, but you can’t always do that.

Why, if there is so little transparency in the Federal Judiciary. I think the answer to some extent is simple, because we police ourselves. There is a word for what results when an institution polices them, and unfortunately to often that word is “white wash.” I am not talking here about intentional cover-up like “Water Gate”. These sorts of high profile intentional “white wash” cases are rare. There is a much more prominent case where members of an institution go easy on their own out of a sincere desire to do what is right. Sincere but misguided, as we shall see in a specific example in just a moment. That is the most common type and perhaps the most troubled type of “white wash.” Of course your job as External Oversight is designed to stop that within the institution that this occurs. But you and your External Oversight function do not exist in the land of the Federal judiciary. So why don’t we just hire all of you to come work for us and provide oversight. Wouldn’t you love that job? You can tell Federal Judges what to do and how to do it. Tell them when they have overstepped their boundaries. Right, solution, it is that simple.

President William J. Clinton appointed Honorable B. Lynn Winmill a United States District Judge for the District of Idaho on August 14, 1995. In addition to his regular Chief Judge duties within the District of Idaho, Judge Winmill was recently appointed by the U.S. Supreme Court Chief Justice William H. Rehnquist to serve on the Information Technology Committee of the Judicial Conference. This prestigious committee provides general policy recommendations, planning and oversight of the judiciary information technology program.

Honorable B. Lynn Winmill is a graduate of Harvard Law School, and an Iowa State University Undergraduate. He was appointed to the Federal Bench on August 14, 1995. Prior to being appointed a Federal Judge he was a District Judge in Idaho in the Sixth Judicial District in the State of Idaho. Judge Winmill is very active and has been through out his career on legal councils, different committees, for the Boy Scouts of America and other community activities, in

addition to his regular duties as Chief Judge for the District of Idaho. Judge Winmill was recently appointed on the U.S. Supreme Court Chief Justice, William H. Rehnquist to serve on the Information Technology Committee at the Judicial Conference. This prestigious committee provides general policy recommendation, planning and Oversight Judiciary Information Technology Program. Assisting Judge Winmill and his Presentation is Suzy Headley.

Keynote Luncheon: “*The Rule of Law in a time of Terror*”
David Nevin, Esq., Nevin, Benjamin & McKay, LLP

Panelist

David Nevin, ESQ. is a fellow of the American College of Trial Lawyers. He serves as an Adjunct Professor of Trial Practice at the University of Idaho College of Law and previously taught at the University of Toledo College of Law. The Lawdragon Magazine recently named Mr. Nevin a “Lawdragon,” one of the top 500 lawyers in the United States. Mr. Nevin received his J.D. (Cum Laude) from the University of Idaho, College of Law in 1978 and his B.A. from Colorado State University in 1974.

On February 26, 2003, Sami Omar Al-Hussayen was a 34-year-old Saudi graduate student at the University of Idaho, a few months away from completing his Ph.D. and returning home to life as a university professor. On that day over 100 federal agents descended on the sleepy college town of Moscow, Idaho, arrested Sami at 4 a.m. in the presence of his terrified wife and 3 children, and then fanned out around the community interrogating Middle Eastern students, some of them for five to six hours. Sami was charged with multiple counts of Providing Material Support to Terrorism, and in an 8-week trial in the spring of 2004, acquitted and freed-but not before spending 511 days in solitary confinement. Intended as a high water mark in the war on terrorism, Sami’s case is instead viewed as an example of government overreaching, and is frequently cited in Congressional debates on extension of the Patriot Act. In this address, Mr. Al-Hussayen’s lead counsel provides some insight into the surprising intensity of the government’s investigation and prosecution, and considers the value of citizen oversight of police behavior in this most volatile and politically charged area of law enforcement.

Sami Omar Al-Hussayen, a native of Saudi Arabia and graduate student in Computer Science at the University of Idaho, is a webmaster whose actions placed him at the center of a Patriot Act lawsuit. Allegedly a major force within the Islamic Assembly of North America, Al-Hussayen ran websites that allegedly recruited, funded, and otherwise supported Islamic terrorists within the United States. Although Al-Hussayen claims he merely volunteered his skills in order to run the sites (based in Michigan), the government insists that this and other involvement, constitutes knowing involvement in terrorism-related activities. Al-Hussayen is also defended online by the Electronic Frontier Foundation.

David Nevin has defended criminal cases in Idaho, the Pacific Northwest, and beyond for more than 25 years. He has obtained acquittals in a number of high profile prosecutions, which implicated issues of civil rights and government overreaching, including the 1993 Ruby Ridge case, and the recent terrorism prosecution on a Saudi Arabian graduate student.

Session Eight-Concurrent Session
Database & Tracking Systems for Effective Oversight

Panelist

Kelvyn Anderson, Deputy Director, Police Advisory Commission, Philadelphia, Pennsylvania.

Florence Finkle is an Executive Director, Civilian Complaint Review Board, New York, New York.

Yuri Gregorev is a MIS Director, Civilian Complaint Review Board, New York, New York.

Mike Gunnare is a Senior IT Developer, Denver Public Safety Department, and Denver, Colorado.

Over the last 20 years, technology's influence on policing has altered the methodology of oversight. Managing police records, investigating complaints, identifying trends and creating early-warning systems requires careful planning, technical savvy, and the ability to respond to constant change. In this session, information managers from New York, Denver, and Philadelphia will pop the hood open and reveal the inner workings of their systems, consider their strengths and weaknesses, and offer guidance for other agencies looking for both standardized and innovative uses of digital information to achieve effective oversight.

CCRB System-Civilian Complaint Review Board conduct investigation independently jurisdiction over the NYPD:

- Required to have an ongoing education and mediation program staff of a 184.
- Budget of about \$10 million
- Import of database need to provide info to public about complete

Database can notify you or office of problematic offices (Softec-company that programmed the database system re: complaints):

- Where complaint was made
- How the complaint was made
- Automatically assigns a complaint number
- Whether an arrest was made-charges that was on report
- Separate tab for witness
- Sex, Race, Age

The officer screen of this program shows allegations against the officer, rank, and recommendation that were made.

- Complaint Status-who entered the complaint
- Recommendation section-what the investigation recommend; second screen-board outcome
- How many complaints were filed against officer screen

The Police Department has access to this complaint data. System captures the work that is performed on the case.

- Letter is possibly generated from data.
- Date of Incident-where the incident took place.
- Interview summary-letter summoning complaint/officer.
- The system also has a case indicator. It reminds you that the case has not been assigned.

In 1973, the National Advisory Commission on Criminal Justice Standards and Goals Task Force on Police observed that "no police agency could maintain internal order if employee misconduct were rampant, just as it could not maintain social order if public anarchy were rampant."

However, in contemporary times, national law enforcement agencies still face the challenges of preventing, monitoring, and addressing police misconduct incidents.

Several methods that are used to maintain internal order in police departments include reducing incidents of unnecessary deadly force, identifying substantiated civilian complaints of police misconduct, monitoring routine encounters between the police department and the public, conducting internal investigations, and recommending discipline for officer misconduct. Accordingly, this section of the report provides an overview of how various police departments in the United States are addressing these primary issues.

Kelvyn Anderson is a 20-year veteran of investigative work in the public and private sectors, Deputy Director of the Police Advisory Commission in Philadelphia, PA, where he has worked since 2000. Anderson worked as a private investigator from 1995 to 2000, conducting video surveillance and claims investigator for attorneys and insurance companies. Anderson currently serves NACOLE as Webmaster and moderator of the Police Oversight listserv.

Florence Finkle is Executive Director of the New York City Civilian Review Board. A 1984 graduate of Tuffs University, Ms. Finkle obtained her law degree from New York University School of Law in 1997. She was designated a member of that office's Asian Gang Unit and from 1994 to 1996 was a member of the district attorney's Official Corruption Unit. There she helped to build the case against officers of their 30th Precinct, an investigation and prosecution that led to the conviction of thirty police officers on various charges of corruption. Ms. Finkle personally won convictions following three separates jury trials of officers who had committed perjury to cover up their illegal searches and seizures.

Mr. Yuri Gregorev has fifteen years of experience in both the public and private sectors designing and implementing business and communications applications. He served as the database administrator at Vitech Systems, where he designed databases for clients such as Goldman Sachs and McKinsey & Company. He is both the programmer for and the administrator of the CCRB's complaint tracking system. During the last four years, Mr. Gregorev added key new features to the CCRB's complaint tracking system and through innovative programming modernized and improved its functionality. In September 2006, became the CCRB's MIS director.

Mike Gunnare currently serves as the Senior IT Developer for the City & County of Denver's Department of Safety. He has worked in the computer industry as an application developer for 19 years, with 10 years of experience in the travel industry and 9 years in law enforcement. Mr. Gunnare received his Bachelor of Science in Computer Information Systems from Arizona State University.

Session Nine – Concurrent Session with session 8

Session Ten – Concurrent Session with session 8

Session Eleven-Concurrent Session

**Training Session V: “Conducting Civilian Oversight Investigations:
Implementing/Evaluating the Investigation Plan & Interviewing Complainants”**

Panelist

Kesha Taylor, Assistance Chief Investigator, Office of Police Complaints, Washington, D.C.

Jayson Wechter, Investigator, Office of Citizen Complaints, San Francisco, California.

Using two case studies presented in the previous investigative session (which will be available in written form and reviewed at the start of this session) participants will work in breakout groups of 6 to 8, discuss how to create and implement and investigate plan, including:

- b. What documents, physical evidence and witnesses are relevant to the complaint and the issues it raises?
- c. How will this evidence be obtained, and in what sequence?
- d. What are the priorities and the time line for the investigation?
- e. What obstacles and delays are likely to arise during the investigation and how will they be overcome?
- f. Due diligence standards for investigations.

Utilizing role-playing, we will draw on audience participation to replicate the steps in a successful and thorough investigation, including demonstrations of how to effectively interview complainants in the two case studies introduced.

This training offered a breakdown of the interview process, including the progression of the questioning process from general to specific, interview techniques, and some basic interview guidelines.

The primary goal of an interview is to obtain and record information from the complainant, your subject, and all of your critical witnesses. Your investigation is not complete until this has been accomplished. Successful and effective interviewing is a skill that is learned and while most people learn by watching others, having a good foundation in the principles of interviewing is vital to becoming an effective interviewer. Interviewing a witness means having a conversation. It is not an interrogation.

Prior to conducting your interview, you must understand the purpose of your interview, which is to obtain and record information. In an effort to reach that goal, it is important to establish a rapport, remain objective, maintain neutrality and objectivity, and listen attentively. The interview should be divided into the following segments – keeping in mind that throughout the interview process you are building and maintaining rapport with the interviewee:

- Introduction/Build Rapport: Establishing who you are and the purpose of your interview.
- General Questions: Getting the interviewee comfortable with the process and providing an overview of the incident.
- Specific Questions: Going over the scenario asking questions and having the interview expand upon the incident.
- Detailed Questions: Getting to the finer points and last minute questions that are detail specific.

Important Reminders-the following things are important to keep in mind when conducting your investigation:

- Find out, whether they have submitted this complaint to anyone else.
- Try to get to witnesses as soon as possible.

- It may sometimes make sense to interview witnesses of lesser importance first and to save the complaining witness for last, so that you have a better understanding of the case and can ask intelligent questions.
- Interview only one witness at a time.
- Witnesses, who are minors, pose special problems. You must use discretion and keep in mind that a statement taken from a young child, without an adult present, may look coercive.
- Do not use any recording devices unless the express procedure of your office/department.

Kesha Taylor was hired as the Assistant Chief Investigator of the Office of Police Complaints for the District of Columbia in July 2002. Prior to accepting this position, Ms. Taylor worked with the investigations Division of the Public Defender Service for the District of Columbia for seven years. While there, Ms. Taylor served most recently as a Staff Investigator and as Coordinator of the Internship Program. Ms. Taylor obtained her undergraduate degree in political science and English from the University of Vermont. She also received her master's degree in higher education from Cornell University.

Jason Wechter is an investigator for the Office of Citizen Complaints in San Francisco. Mr. Wechter helped establish San Francisco's civilian oversight agency, the Office of Citizen Complaints in 1983, and helped shape many of its early policies and procedures. Wechter served the agency from 1983 to 1984, and again from 1998 to the present as a staff and a supervisory investigator, and has drafted policy recommendations relating to crowd control procedures and officer-involved shootings.

Wechter began his career as a freelance journalist and investigative reporter, and became a legal investigator in 1979, specializing in complex criminal and civil investigations. Wechter is the author of a September 2004 report issued by the Police Professionalism Initiative of the University of Nebraska at Omaha, *Investigating Citizen Complaints is Different: The Special Challenges of Investigating Citizen Complaints Against Police Officers*.